No. 188.

Brief of Markham for D. E.

Supreme Court of United States

OCTOBER TERM, 1898.

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Filed Jan. 20, 1899.

THE SECURITY TRUST COMPANY, as Assignee of the D. D. Merrill Company,

Plaintiff in Error.

vs.

FRANK H. DODD, BLEECKER VAN WAGENEN and ROBERT H. DODD, Co-partners as Dodd, Mead & Company,

Defendants in Error.

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

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Review Publishing Co., St. Paul, Minn.

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The questions presented for the consideration of this court as appears from the certificate, are these:

"First. Did the execution and delivery of the deed of assignment by the D. D. Merrill Company to the Security Trust Company and the acceptance of the same by the latter company and its qualifications as assignee thereunder vest said assignee with

the title to the personal property then located in the state of Massachusetts and in the custody and possession of Alfred Mudge & Sons?

"Second. Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, together with the notice of such assignment which was given to Alfred Mudge & Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully seized by attachment under process issued by the superior court of Suffolk county, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the state of New York, and who had notice of the assignment but had not proven their claim against the assigned estate nor filed a release of their claim?"

By these interrogatories, we assume that the court of appeals desires to be advised whether the proceedings had by the defendants in error in the state of Massachusetts, in the manner and under the circumstances related, were lawful or tortious, for we think there is a well recognized distinction between the rule of law to be applied in a case where the assignee claiming title to the property by virtue of an assignment executed in another state, intervenes in the original proceeding in the state where the property is seized, or takes other appropriate and timely proceedings *in that state* for the assertion of his right as against the *conflicting* right of the attacking creditor and the rule to be applied in a case where he stands by with full knowledge of the proceedings being taken and allows the attaching creditor to reduce the

property to possession and to perfect his lien by judgment and sale on execution, and then brings an action for the conversion of the property so attached. In the first case he appeals to the equity of the court; in the second he stands upon a strict legal right.

This distinction is recognized by the courts of Massachusetts, particularly in the case of Lawrence v. Bachelor, 131 Mass. 504, where the assignee of an insolvent debtor in Massachusetts had brought suit against another Massachusetts citizen who had gone into other states and attached property of the insolvent debtor and sold it in satisfaction of his debt. The assignee insisted that inasmuch as the courts of that state would enjoin its citizens from proceeding against the property of the insolvent debtor, who had made an assignment under the laws of that state, if timely asked to do so, that it would require such citizen who had gone abroad and recovered money from the property of the insolvent, to turn the same over to the assignee, but the court held that this contention could not prevail. The court, by Justice Field, said:

"The argument of the plaintiffs in the case at bar is, that, as it was contrary to equity for the defendant to proceed with his suits to judgment and to a satisfaction of the judgments from the funds attached, so it is contrary to equity for him to retain the money so obtained; and that they can maintain an action at law against the defendant for money had and received to their use, because the money *ex aequo et bono* belongs to them. This argument rests on the assumption that courts of law will afford a remedy in damages for all wrongs done, which courts of equity, if seasonably applied to,

will prevent; but this is not true. Courts of equity recognize and enforce rights which courts of law do not recognize at all; and it is often on this ground that defendants in equity are enjoined from prosecuting actions at law."

"In the case at bar the title to the credits attached, which pass to the assignees by virtue of the proceedings in insolvency, whether it be regarded as a legal or an equitable title, was a title subject to attachments. As neither the common law nor our statutes give any right of action on the facts agreed in this case, the assignees cannot maintain their suit if the attachments were properly made."

This rule is cited with approval in the subsequent case of Cunningham v. Butler, 142 Mass. at page 51. And at page 49 the court, in its opinion, in distinguishing that case, which was instituted to restrain the creditor from proceeding against the property by attachment, comments at length upon the fact that in the case of Green v. Van Buskirk, 5 Wall. 307 and 7 Wall. 139, the plaintiff stood by and did not avail himself of the privilege of intervening in the attachment suit in the state of Illinois.

And in this same case of Cunningham v. Butler, which came to this court upon writ of error from the court of Massachusetts, under the title of Cole v. Cunningham, (133 U. S. 107) Chief Justice Fuller, in commenting upon the case of Green v. Van Buskirk, supra, said:

"It will be perceived that it was manifestly inadmissible to hold that after Van Buskirk had permitted Green to go to judgment in a proceeding *in rem* which appropriated the property as belonging to Bates, he could then get judgment against Green for the conversion of what had so been adjudged to him, an adjudication which Van Buskirk had vo'un-

tarily declined to litigate in the proper forum, and had not sought in his own state to prevent. It was a contest between two individuals claiming the same property, and that property capable of an actual *situs* and actually situated in Illinois. The attachment was not only levied in accordance with the laws of Illinois, but the laws of the state affirmatively invalidated the instrument under which Van Buskirk claimed. Clearly, then, the law of the domicil of Van Buskirk, Green and Bates could not overcome such registry and other positive laws of Illinois as were distinctively coercive. Hervey v. R. I. Locomotive Works, 93 U. S. 664; Walworth v. Harris, 129 U. S. 355."

And in the case of Green v. Van Buskirk, 7 Wall. 139, Justice Davis, in discussing this point, says:

"It should be borne in mind, in the discussion of this case, that the record in the attachment suit was not used as the foundation of an action, but for purposes of defense. Of course Green could not sue Bates on it, because the court had no jurisdiction of his person; nor could it operate on any other property belonging to Bates than that which was attached. But, as by the law of Illinois, Bates was the owner of the iron safes when the writ of attachment was levied, and as Green could and did lawfully attach them to satisfy his debt in a court which had jurisdiction to render the judgment, and as the safes were lawfully sold to satisfy that judgment, it follows than when thus sold the right of property in them was changed, and the title to them became vested in the purchasers at the sale. And as the effect of the levy, judgment and sale is to protect Green if sued in the courts of Illinois, and these proceedings are produced for his own justification, it ought to require no argument to show that when sued in the court of another state for the same transaction, and he justifies in the same manner, that he is also protected. Any other rule would destroy all safety in derivative titles, and deny to a state the power to regulate the transfer of personal property within its limits, and to subject such property to legal proceedings."

The language used by the Supreme Court of Kansas in a case decided in that court in 1897 is particularly applicable to the facts of the case at bar. In that case the plaintiff brought an action in the state of Kansas for damages for the unlawful taking by attachment of certain chattels belonging to him situated in the state of Arkansas; the property seized being exempt by the laws of Kansas where the plaintiff lived but not by the laws of Arkansas, where seized. The defendant, the attaching creditor in the original suit, was a citizen of Missouri—a situation similar as to parties to that which we have here. The court, in its opinion, said:

"It is difficult to see how it can be a tort for a resident of Missouri to sue a citizen of Kansas in the state of Arkansas, for a debt admitted to be owing and due, and in such action to take property which is exempt in Kansas, but not exempt in Arkansas, by attachment, to satisfy the judgments obtained in such action. There being no tort, no liability would ensue. Besides, it is evident that if the proposition now pressed by plaintiff is correct, it ought to have been presented to the court in Arkansas as a defense in that action, and plaintiff ought to be bound by the adjudication made by that court, if he has negligently failed to present to it the defense which, from his argument we must infer, he now claims would have been good and complete. The petition shows that the plaintiff gave the court no intimation that he claimed the property seized as exempt. That was the time and place for such action on his part, but he chose to omit it. See 1 Van Fleet, 159; 1 High on Injunction (2nd Ed.) 114; Green v. Van Buskirk, 5 Wall. 307; 7 Wall, 139; Railway v. Thompson, 31 Kas. 180; 1 Pac. Rep. 622."

Williamson v. Kansas & Texas Coal Co., 50 Pac. Rept. 106.

See also Moore v. R. R. Co., 43 Ia. 385.

The plaintiff in error not only stood by, with full notice of the proceedings taken in the attachment suit, and allowed the defendants in error to perfect their lien by proceeding to judgment, and condemnation of the property by the courts of Massachusetts, by execution and sale, but neglected for a period of about six months, which expired between the date of the assignment and the attachment, to take any proceedings to obtain possession of the property.

For an answer to the questions asked by the Court of Appeals we must look mainly to the law of the state of Massachusetts, as construed and declared by the courts of that state, where the property in question was situate at the time of the alleged conversion thereof. For, notwithstanding the ancient, and oft repeated fiction of law, that the domicil draws to it the personal estate of the owner, wherever situated, it is well settled that each state has the right to determine, as regards property situated within its borders, what effect, if any, shall be given to a foreign assignment, whether voluntary or involuntary. And the recognition of such an assignment for any purpose, or to any extent, being wholly *an act of comity* and *not a recognition of a legal right*, each state has the right to determine for itself whether the claim of a foreign assignee will be recognized at all, or if so, whether such claim will be held superior or inferior to the rights of an attaching creditor, pursuing his

remedy against such property, in the usual course of procedure, in the courts of that state.

This is laid down by Story, in his work on Conflict of Laws, as the settled rule of law in this country. In considering this question, he says:

"It will be unnecessary to discuss the matter at large, as to personal property, since the general doctrine is not controverted that, although movables are for many purposes to be deemed to have no *situs* except that of the domicil of the owner, yet this being but a *legal fiction*, it yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. It may regulate its transfer, and subject it to process and execution, and provide for and control the uses and disposition of it, to the same extent that it may exert its authority over immovable property. One of the grounds upon which, as we have seen, jurisdiction is assumed over non-residents, is through the instrumentality of their personal property, as well as of their real property, within the local sovereignty. Hence it is that, whenever personal property is taken by arrest, attachment or execution, within a state, the title so acquired under the laws of the state is held valid in every other state; *and the same rule is applied to debts due to non-residents, which are subjected to the like process under the local laws of a state.*"

Story, Confl. Laws, Sec. 550.

"In regard to title of executors and administrators derived from grant of administration in the country of the domicil of the deceased, it is to be considered that that title cannot *de jure* extend as a matter of right beyond the territory of the government which grants it, and the movable property therein. As to movable property situated in

foreign countries, the title, if acknowledged at all, is acknowledged *ex comitate* and of course it is subject to be controlled or modified as every nation may think proper with reference to its own institutions and its own policy and the rights of its own subjects."

Story, Confl. Laws, Sec. 512.

"No one can seriously doubt that it is competent for any state to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its territorial limits. Nor can such a rule, made for the benefit of innocent purchasers and creditors, be justly deemed open to the reproach of being founded in a narrow and selfish policy."

Story, Confl. Laws, Sec. 390.

And this court, in the case of Hervey v. R. I. Loco. Works, 93 U. S., 664, said:

"The liability of property to be sold under legal process, issued from the courts of the state where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the transfer of the property lawful in that jurisdiction, respected in the courts of the state where it is found, and it is only on the principle of *comity* that it is ever allowed, but this principle yields when the laws and policy of the latter state conflict with those of the former."

In the case of Green v. Van Buskirk, it is held that the laws of the state of Illinois, where the property in controversy when seized was situated,

and not the laws of New York, the domicile of the owner of the property, must prevail. The court said:

"There is no little conflict of authority on the general question as to how far the transfer of personal property by assignment or sale, made in the country of the domicil of the owner, will be held to be valid in the courts of the country where the property is situated, when these are in different sovereignties. The learned author of the Commentaries on the Conflict of Laws has discussed the subject with his usual exhaustive research. And it may be conceded that as a question of comity, the weight of his authority is in favor of the proposition that such transfer will, generally, be respected by the courts of the country where the property is located, although the mode of transfer may be different from that prescribed by the local law. The courts of Vermont and Louisiana, which have given this question the fullest consideration, have, however, either decided adversely to this doctrine or essentially modified it. Thayer v. Boardman, 25 Vt. 589; Ward v. Morrison, 25 Vt. 393; Emerson v. Partridge, 27 Vt. 8; Olivier v. Townes, 2 Mart. (N. S.) 93; Norris v. Mumford, 4 Mart. 20. Such also seems to have been the view of the Supreme Court of Massachusetts. Lanfear v. Sumner, 17 Mass. 110.

"But after all, this is a mere principle of comity between the courts, which must give way when the statutes of the country where property is situated, or the established policy of its laws prescribe to its courts a different rule."

Green v. Van Buskirk, 5 Wall. 307.

To the same effect are Green v. Van Buskirk, 7 Wall. 139; Lanfear v. Sumner, 17 Mass. 110; Ingraham v. Geyer, 13 Mass. 146; Zipcey v. Thompson, 1 Gray, 245; Pierce v. O'Brien, 129 Mass. 314; Hallgarten v. Oldham, 135 Mass. 7; Paine v. Lester, 44

Conn. 196; Milne v. Moreton, 6 Binney (Pa) 352; Graham v. First Nat. Bank, 84 N. Y. 393; Herbernia Bank v. Lacombe, 84 N. Y. 367; Warner v. Jaffrey, 96 N. Y. 248; Denney v. Faulkner, 22 Kans. 80, and authorities cited in these cases.

The Supreme Court of Minnesota, in discussing the effect to be given to an assignment under the insolvency act here under consideration, upon the property of the debtor situated in Wisconsin, said:

"We may also take it as settled that the question whether property situated in Wisconsin is subject to attachment or levy by creditors, notwithstanding any assignment made in another state, is to be determined exclusively by the laws of Wisconsin, the *situs* of the property."

Jenks v. Ludden, 34 Minn. 482.

There are numerous cases which hold by way of extension of the general rule, originally restricted to transfers by way of bargain and sale, that, by virtue of the *comity* which exists between different states of the Union, *a general voluntary assignment* of a debtor's property, for the benefit of his creditors, valid by the law of his domicil, *and not in conflict with the express enactments or the settled policy of the sister state*, where the property is situated, will be recognized in the courts of that state as effectual to transfer to the assignee the right to the possession of such property as against a stranger or as against a subsequent attaching creditor, but this rule, even in this restricted sense, has never prevailed to its full extent in the state of Massachusetts, for the courts of that

state have repeatedly and persistently refused to recognize the right of a foreign assignee to withdraw the property of the insolvent debtor from the state, to the injury or prejudice of Massachusetts creditors, especially so when the assignment has not been assented to by the creditors. Lanfear v. Sumner, 17 Mass. 110; Edwards v. Mitchell, 1 Gray, 239; Fall River Iron Works v. Croads, 15 Pick. 11; Pierve v. O'Brien, 129 Mass. 314; Faulkner v. Hyman, 142 Mass. 53, and cases cited.

But in no state will a foreign assignment be recognized when *not* made in conformity with the provisions of the laws of the state where the property assigned is situated, or if the provisions of the assignment are inconsistent with, or repugnant to the positive law or settled policy of that state, if its validity is called in question by creditors of the original owner, *for where comity* and the *positive laws* of the foreign state where the property is situated come in conflict, the former must yield to the latter.

2 Kent's Com., 555, 599; Story on Confl. Laws; Burrill on Assignment, 4th Ed., Sec. 303; Green v. Van Buskirk, 7 Wal., 139; Hervey v. R. I. Loco. Wks., 93 U. S. 664; Ingraham v. Geyer, 13 Mass. 146; Taylor v. Ins. Co., 14 Allen 353; Osborn v. Adams, 18 Pick. 245; Pierce v. O'Brien, 129 Mass. 314; Faulkner v. Hyman, 142 Mass. 53; People ex rel. Hoyt v. Com. Tax., 23 N. Y. 225; Edgerton v. Bush, 81 N. Y. 199; Ockerman v. Cross, 54 N. Y. 29; Hibernia Bank v. Lacombe, 84 N. Y. 367; Warner v. Jaffray, 96 N. Y. 248; Paine v. Lester, 44 Conn. 196; Upton v. Hubbard, 28 Conn. 273; Denny v. Faulkner, 22 Kans. 80; Lewis v. Bush., 30 Minn. 244; Jenks v. Ludden, 34 Minn. 482; Frazen v. Hutchinson, 62 N. W. (Ia.) (Minn. Statute) 698; Moore v.

Church, 70 Ia. 208; Sheldon v. Blanveld, 29 S. C. 453; Struker v. Tinkham, 35 Ga. 176; Mason v. Stricker, 37 Ga.262; Taylor v. Boardman, 25 Ga.593; Emerson v. Partridge, 27 Vt. 8; Martin v. Potter, 34 Vt. 87; Norris v. Mumford, 4 Mart. (La.) 20; Olivier v. Townes, 14 Mart. (La.) 93; Van Grytten v. Digby, 31 Beav. 561.

Nor will an assignment which depends for its force and validity upon the laws of another state, be recognized or enforced as against attaching creditors or bona fide purchasers.

Blake v. Williams, 6 Pick. 286; Taylor v. Columbia Ins. Co., 14 Allen 350; Osborn v. Adams, 18 Pick. 247; Ingraham v. Geyer, 13 Mass. 146; Pierce v. O'Brien, 129 Mass. 314; Frank v. Bobbitt, 155 Mass. 112; Story on Conflict of Laws (8th Ed.), Sec. 411; Burrill on Assignments (4th Ed.), Sec. 303; High on Receivers, 241; Harrison v. Sterry, 5 Cranch 289; Ogden v. Saunders, 12 Wheat. 213; Gilman v. Lockwood, 71 U. S. 409; Denney v. Bennett, 128 U. S. 438; Upton v. Hubbard, 28 Conn. 273; Paine v. Lester, 44 Conn. 196; Johnson v. Hunt, 23 Wend. 87; Abraham v. Plastoro, 3 Wend. 538; Willitts v. Waite, 25 N. Y. 587; Kelly v. Crapo, 45 N. Y. 86; Warner v. Jaffary, 96 N. Y. 248; Barth v. Backus, 140 N. Y. 230; Catlin v. Wilcox S. P. Co., 123 Ind. 477; McClure v. Campbell, 71 Wis. 350; Rhaum v. Pierce, 110 Ill. 359; Townsend v. Coxe, 151 Ill. 62 (37 N. E. R. 689); Milne v. Moreton, 6 Binney, 352; Manhattan Co. v. Steele Co., 31 Ohio L. J. 62; Moore v. Church. 70 Ia. 208; Franzen v. Hutchinson (Ia.), 62 N. W. 698; Dalton v. Currier, 40 N. H. 237; Hunt v. Ins. Co., 55 Me. 290; Ward v. Morrison, 25 Vt. 598; Weider v. Maddox, 66 Tex. 372; Walters v. Whitlock, 9 Fla. 86; Life Association v. Levy, 32 La. Ann. 1203.

And an assignment made under the laws of another state, which would be invalid if made in the state of Massachusetts, will not be enforced in that

state as against attaching creditors of the insolvent debtor, whether the assignment is prior or subsequent to the attachment. Zipcey v. Thompson, 1 Gray, 243; Fall River Iron Works v. Croade, 15 Pick. 11; Ingraham v. Geyer, 13 Mass. 146; Osborn v. Adams, 18 Pick. 245; Swan v. Crafts, 124 Mass. 453; Oldham v. Hallgarten, 135 Mass. 1; Faulkner v. Hyman, 142 Mass. 53, and cases there cited.

The assignment under consideration was made pursuant to Chapter 148 of the General Laws of Minnesota, for the year 1881, and the acts amendatory thereof, and is to be construed in view of the provisions of that act, which as far as important here are set out at length in an appendix to this brief.

The assignment was ineffectual as to attaching creditors in Massachusetts for several reasons:

1. There was no delivery of the property there situated;

2. There was no consideration for the assignment;

3. Its provisions were contrary to the settled policy and the express statutory enactments of that state.

4. It depends for its validity and force upon the statutory enactments of the state of Minnesota, which are derogatory of the Common Law, both of Massachusetts and of Minnesota.

The courts of Massachusetts have uniformly held since the decision of the case of Lanfear v. Sum-

ner, 17 Mass. 110 down to the present time, that a sale or transfer, in any form, of personal property, in order to be effectual as against bona fide purchasers or as against attaching creditors, must be accompanied by a change of possession, where the property sought to be transferred is capable of manual delivery. Property of great bulk not capable of delivery must in the nature of things be susceptible of constructive delivery without actual change of possession, and the same is true of certain other property, such as ships at sea and their cargoes. These exceptions are recognized by the courts of Massachusetts; but personal property, capable of delivery must be accompanied by actual and immediate change of possession, in order than the transfer may be effectual as to bona fide purchasers *or as to attaching creditors*. Lanfear v. Sumner, 17 Mass. 109; Hallgarten v. Oldham, 135 Mass. p. 1. The decision of the court in the case of Lanfear v. Sumner, has sometimes been criticized by American and English courts, but nevertheless it remains the law of Massachusetts, as shown by the subsequent decision in the case of Hallgarten v. Oldham, supra, decided in 1883, where this whole question was thoroughly considered.

In that case, the owner of certain personal property stored the same in a private warehouse in Massachusetts, and received from the keeper a receipt for the goods, by which it was promised, upon payment of the storage charges, to deliver to him his goods upon demand. The owner being indebted to a certain New York bank indorsed the ware-

house receipt in blank and delivered it to the bank as security for his indebtedness. This assignment and delivery of the warehouse receipt was supposed to be sufficient in New York under the decision of Wilkes v. Ferris, 5 John. 335; and Yenni v. McNamee, 45 N. Y. 614, to pass the title to the property to the bank. Subsequent to the transfer of the warehouse receipt a creditor brought suit in Massachusetts and attached the property, which was taken into the custody of the sheriff. The bank brought action against the sheriff for a recovery of the goods, claiming a prior title, as assignees of the warehouse receipt. At the time the attachment was made the goods were still in the hands of the warehouseman, and it was held by the trial court that the attaching creditor obtained a prior right to the property, by reason of the fact that there had been no delivery, and the plaintiffs appealed. Holmes, J., in delivering the opinion of the court, said:

"This case must be governed by the ordinary rule applicable to similar transactions taking place wholly within this state. When a sale, mortgage, or pledge of goods within the jurisdiction of a certain state is made elsewhere, it is not only competent, but reasonable, for the state which has the goods within its power to require them to be dealt with in the same way as would be necessary in a domestic transaction, in order to pass a title which it will recognize as against domestic creditors of the vendor of pledgor. This requirement is not peculiar to Massachusetts, but has the sanction of the highest courts of the United States and of other states." Citing numerous authorities.

"It is not necessary for the purposes of this case to consider whether it should be dealt with as an

exception to the general rule or as an illustration of sound and fundamental principle.

"We pass to the question whether enough has been done to give the plaintiffs a good title as against the defendant * * * as against attaching creditors, the law of Massachusetts has always required a delivery as well in the case of an absolute transfer, even a sale, as in that of a chattel mortgage or pledge, from the time of Lanfear v. Sumner, ubi supra, down to the latest volume of reports."

"*The delivery required by the rule in Lanfear v. Sumner, is delivery in its natural sense, that is, change of possession.*"

It was insisted that the bailee, upon a legal transfer of the property, became the agent or servant of the holder of the warehouse receipt, but the court held that his consent to hold for the purchaser must be shown and could not be presumed.

"It is obvious that a custodian cannot become the servant of another in respect of his custody, except by his own agreement. * * * When a private warehouse-man, who has an unfettered right to choose the persons for whom he will hold, gives a receipt containing only an undertaking to his bailor personally without the words 'or order' or any other form of offer or assent to hold for any one else, it is impossible to say that a mere indorsement over of that receipt will make him the bailee for a stranger. He has not consented to become so, * * * and until he has consented to hold for some one else, he remains the bailee of the party who entrusted him with the goods."

The bailor in that case had no notice of the transfer, but the inquiry was suggested in the case whether under the decisions of the Massachusetts court particularly in the case of Tucksworth v. Moore, 9 Pick. 347, if the bailee was notified of the

transfer of the property and continued to hold the same without objection his assent to hold for the purchaser would not be presumed, and such notice amount to a constructive delivery. But an examination of this and similar Massachusetts cases will show that the case is not applicable to the present case, for the conveyance was by absolute bill of sale, and the bailee had not only been advised of the transfer, but had been directed by both parties to the sale to hold the property for the purchaser, to which he tacitly assented, having no interest in the matter one way or the other. A similar condition existed in each of the Massachusetts cases there relied upon; and we think that in no case in Massachusetts, where the question was involved, has the court held that mere notice to a third party holding the property amounts to constructive delivery.

In the case at bar it is admitted by the stipulation of facts that the plaintiff in error never in fact acquired the actual custody or possession of the property, or any part thereof. And the only notice given to Mudge & Sons, which is as follows:— "I hereby notify you that for Security Trust Company, assignee, I take possession of the plates of the D. D. Merrill Company in your hands. George Earnest Merrill;"—was insufficient in itself to notify them of the fact, (if it were true) that the property in their hands had passed from the D. D. Merrill Company to the Security Trust Company. This being so, the notice did not require any assent or dissent on the part of Mudge & Sons. Furthermore, it nowhere appears that George E. Merrill

was an officer or agent of the D. D. Merrill Company, or of the Security Trust Company, or other than a mere stranger, when he assumed to act for the assignee. He did not assume to represent the D. D. Merrill Company, the bailor, and did not in fact take possession of the property. Nor did he obtain the consent of Mudge & Sons to hold the property as bailee for the assignee. Such consent, under the circumstances, certainly cannot be presumed. It does not appear what action, if any, was taken by them, but the fact that the D. D. Merrill Company was indebted to them in a considerable sum ($126.80, page 2 of the Certificate,) is sufficient to raise the presumption, if presumptions are to be indulged in, that they refused to recognize the title of the assignee to the property. It cannot be said that it made no difference to Mudge & Sons whether they held as bailees for the D. D. Merrill Company or for the assignee. It does not appear by the record that they had any lien upon the property for their indebtedness which would follow it and be collectable from the holder thereof, and if they released the property to the assignee, they would be required to send their claim to the state of Minnesota for collection and take their chances of recovery from the insolvent estate. In view of the well settled law of Massachusetts to the effect that its citizens will not be required to resort to other jurisdictions, when there is property of the debtor in Massachusetts applicable to the payment of the indebtedness, it cannot be presumed that Mudge & Sons consented to turn over this property

to the Security Trust Company or to hold it as its bailee. This indebtedness, as appears by the record and certificate, was never paid by plaintiff in error but remained due Mudge & Sons until on or about March 1, 1894, when it was assigned to the defendant in error and included in the indebtedness for the recovery of which the attachment suit was immediately brought. Fol. 3, p. 2, of the Certificate.

The courts of Massachusetts have repeatedly held that an assignment in trust for the benefit of creditors, whether statutory or common law, the only consideration for which is the acceptance of the trust by the assignee, is invalid against an attachment, except so far as assented to by creditors for whose benefit it was made. Such is the declared policy of the courts of that state. Edwards v. Mitchell, 1 Gray 239, Taylor v. Columbia Ins. Co., 14 Allen, 353; Ward v. Lamson, 6 Pick. 358; Russell v. Woodward, 10 Pick. 407; Fall River Iron Works v. Croade, 15 Pick. 11; Bradford v. Tappan, 11 Pick. 76; Ingraham v. Geyer, 13 Mass. 146; May v. Wannemacher, 111 Mass. 202; Pierce v. O'Brien, 129 Mass. 314; Falkner v. Hyman, 142 Mass. 53.

In the case of Ingraham v. Geyer, 13 Mass. 146, supra, the plaintiff had attached property in the state of Massachusetts belonging to a citizen of Pennsylvania, who had previously made an assignment there for the benefit of such of his creditors as should within four months from the date of the assignment, execute a full release of their demands

against the insolvent debtor, and providing that the proceeds of the estate should be distributed pro rata among such of his creditors as should execute such releases, and providing that the remainder, if any, should be paid over to the assignor. Parker, J., in his opinion, says:

"The question in this case is whether the assignment made by the debtor in Philadelphia is valid here, so as to defeat an attachment of the debt here under our trustee process. This assignment could not be supported if made within this state by parties residing or living here and with a view to being here executed. It is voluntary on the part of the debtor, and involuntary on the part of his creditors. It has no legal consideration; for the debts of those creditors who are to become parties are not discharged at the time, and it shuts out from a participation of the funds, all the creditors who will not give an absolute discharge of their debts. There is indeed, but one party to the indenture, namely, the assignor; for the persons named are his agents, until the creditors sign the instrument. Such an assignment could not be supported here."

The assignment was held to be void and ineffectual as to the rights of the attaching creditors.

In Pierce v. O'Brien, 129 Mass. 314, the insolvent debtor had made a voluntary assignment under the laws of the state of Rhode Island, of all his property both real and personal, to the plaintiff in trust for the benefit of his creditors. The assignment was concededly valid under the laws of Rhode Island. The plaintiff as assignee, took possession under the assignment, of certain personal property situated in the state of Massachusetts, but before the property was removed by the assignee from that com-

monwealth, it was attached by a creditor of the insolvent in the courts of Massachusetts. The assignee brought an action against the attaching creditor for the conversion of the property. It was held that the assignment was ineffectual to transfer to the assignee the title to the personal property of the insolvent debtor situated within the limits of that state. The court in its opinion said:

"The question is, how far our courts are bound to recognize assignments of this kind made in other states, as against our own citizens claiming to hold by attachment, property found in this commonwealth. The question is clearly settled by the decisions.

Independently of insolvent laws or assignments for the benefit of creditors authorized by statute, it has always been held by this court that voluntary assignments by a debtor in this commonwealth, in trust for the payment of debts, and without other adequate consideration, are invalid as against an attachment, except so far as assented to by the creditors for whose benefit they were made. Edwards v. Mitchell, 1 Gray 239; May v. Wannemacker, 111 Mass. 202. The assent of creditors is not presumed, but must be shown by some affirmative act, such as presenting claims or becoming parties to the written assignment. Russell v. Woodward, 10 Pick. 407. *Such assignments made by judicial or legislative authority in another state are not held binding here.* Taylor v. Columbia Ins. Co., 14 Allen, 353. *And an assignment made by the debtor in another state, which if made here would be set aside for want of consideration, will not be sustained against an attachment by a Massachusetts creditor although valid in the place where it is made. There is no comity which requires us to give force to laws of another state, which directly conflict with the laws of our own, or to allow the act of a debtor, resident of another state, an effect*

in disposing of his property, as against his creditors here, which it would not have if he had lived in Massachusetts."

Citing Zipcey v. Thompson, 1 Gray 243; Swan v. Crafts, 124 Mass. 453; Osborn v. Adams, 18 Pick. 245.

In an earlier Massachusetts case it was said:

"Assignments by insolvent debtors in trust to pay their debts, either in a specified order or pro rata, are not deemed of sufficient validity to protect the assigned property from the attachments of the creditors of the assignor. There is no adequate consideration, and without this, no insolvent debtor can so dispose of his property as to place it beyond the reach of his creditors. The validity of such assignments must depend upon the assent of the creditors. Nothing being paid by the assignees, the consideration, as to them, must consist in their covenants to execute the trusts. The creditors are not obliged to become parties to them. Nor is their assent to their provisions to be presumed. They may prefer to resort to attachments. The option is to be exercised by them and to be evidenced by some overt act on their part. If they decline or omit to join in the assignment, there are no cestui que trusts, and so no trust to be executed, and the consideration entirely fails."

Fall River Iron Co. v. Croade, 15 Pick. 11.

In the case of Faulkner v. Hyman, 142 Mass. 53, the plaintiff attached as property of the principal defendants, certain debts due them from persons in Massachusetts named in the writ as trustees. Prior to the attachments, the defendants had made an assignment for the benefit of their creditors, under the laws of the state of New York, of all their property wherever situated, and it was conceded

that this assignment was in all respects valid by the laws of the state of New York. The assignee intervened in the attachment suit in Massachusetts, claiming title to the funds in the hands of the garnishees. It was held that the assignment was ineffectual to transfer the title to the property situated in the state of Massachusetts as against the claims of the attaching creditors. The court in its opinion says:

"This assignment was not executed or assented to by any of the creditors named therein, or any other creditors of the principal defendants for whose benefit it purports to have been executed. It has repeatedly been held in this commonwealth, and by a long series of decisions that a voluntary assignment in trust for the benefit of creditors, the only consideration for which is the acceptance of the trust by the assignee, is invalid against an attachment, except so far as assented to by creditors, in which case, being good at common law, it will protect the property from attachment to the extent of the amount due the creditors thus assenting. This, for the reason that there is no adequate consideration, unless with the assent of creditors, without which no insolvent debtor should be allowed so to dispose of his property as to place it beyond their reach. It has further been held that such assent is not to be presumed, but must be shown by some affirmative act, such as presenting claims, accepting a dividend, or distinctly becoming a party to the written assignment. May v. Wannemacher, 111 Mass. 202; Swan v. Crafts, 124 Mass. 453; Pierce v. O'Brien, 129 Mass. 314."

"The assent of creditors is not presumed, but must be shown by some affirmative act, such as presenting claims, or becoming parties to the written assignment." Pierce v. O'Brien, 129 Mass. 314; Russell v. Woodward, 10 Pick. 407; Swan v. Crafts, 124

Mass. 453; Fall River Iron Works v. Croade, 15 Pick. 11; Falkner v. Hyman, 142 Mass. 53.

And as to creditors who have not assented to the assignment prior to an attachment, the rights of the attaching creditor are superior.

Bradford v. Tappan, 11 Pick. 76.

Pierce v. O'Brien, 129 Mass. 315.

And any surplus in the hands of the assignee, beyond the amount of the aggregate claims of creditors who had assented, would be liable to attachment. Bradford v. Tappan, 11 Pick. 76; Widgery v. Haskell, 5 Mass. 144; Borden v. Sumner, 4 Pick. 265; Pierce v. O'Brien, 129 Mass. 314, 315; Falkner v. Hyman, 142 Mass. 53.

Plaintiff in error has not seen fit, either by appropriate proceeding in Massachusetts, or in the case at bar, to show either that the claims of creditors, in an amount sufficient to absorb the funds in its hands, had been filed prior to the attachment, or that after paying the claims of all creditors other than the defendants in error, there does not remain in its hands, or has not been returned to the assignor, under the provisions of the assignment, a surplus derived from the estate. It is true that the deed of assignment recites that the D. D. Merrill Company, at the time of the assignment was made, was insolvent, but it has been held by the courts of the state of Minnesota, that a debtor is insolvent, within the meaning of the insolvency act, when he is unable, in the ordinary course of business, to meet his obligations as they become due, and it does not necessarily follow therefore that the estate might

not eventually more than pay its entire indebtedness. It was important to plaintiff's right to the property attached in Massachusetts, that these facts, if true, should have been shown to the court of Massachusetts. That was the place for it to assert its rights to the property.

Cunningham v. Butler, 142 Mass. 49-51.

Green v. Van Buskirk, 7 Wall. 139.

Cole v. Cunningham, 133 U. S. 107.

Moore v. Railroad Co., 43 Ia. 385.

Williamson v. Kas. & Texas Coal Co. (Kas.), 50 Pac. Rep. 106, and cases cited.

Section 10, Chapter 184, Pub. Stats. of Massachusetts, provide that,

"When goods of a value greater than $20.00 are unlawfully taken or detained from the owner or person entitled to the possession thereof, or when goods of that value which have been attached on mesne process, or taken on execution, are claimed by a person other than the defendant in the suit in which they are so attached or taken, such owner or other person may cause such goods to be replevined."

This certainly would have afforded one convenient method of determining the title to the property in suit, if plaintiff had chosen to avail itself of it.

There is no showing here that the assignment in question was ever assented to by any of the creditors of the Merrill Company, either before or after the attachment by these defendants of the property in question, and the court cannot presume such assent in the absence of proof thereof.

The contention of the plaintiff in error that the question of its right to show the assent of creditors

before the attachment was made is one of the issues before the Circuit Court of Appeals, has no foundation in fact. The point has never before been raised. A certified copy of the proceedings in the Court of Appeals was before this court a few days since, on motion to bring up the whole record, and the court will remember that no such question was there involved or suggested, and if it had been it certainly is not now before this court.

The act under which the assignment was made, provides that creditors shall file their claims against the estate within thirty days, and that no creditor shall receive any benefits under the assignment, or share of the proceeds of the debtor's estate without having first filed with the clerk of the court a release to the debtor of all claims, except the dividends to be paid under the provision of the statute, and provides that any surplus remaining in the hands of the assignee shall be returned to the assignor. The deed of assignment itself contains all these provisions.

Under this act the debtor may dispose of his entire property in the payment of the indebtedness to a single creditor, in opposition to the express wishes of the remainder, no matter how numerous, unless they come in, file their claims and releases and take their chances on what they will receive from the insolvent estate. Creditors who are unwilling to do this, must stand by and see the entire estate of the debtor appropriated to the payment of the claims of other creditors, to the exclusion of their

own, and they are not even allowed the surplus remaining after payment of the claims of the creditors who have assented. An assignment of this character has been held by the Supreme Court of Minnesota in the case of May v. Walker, 35 Minn. 194, to be absolutely void at common law, as to creditors who have not consented to it, and not merely ineffectual for the purpose of compelling creditors to release their claims against the debtor, as is claimed by the plaintiff in error (page 16 of plaintiff's brief).

The court says:

"Though there is some conflict of opinion, every consideration of honesty and good sense supports the proposition that an assignment by an insolvent debtor of his property, providing, as in the present case, that the proceeds shall be applied towards the payment of his indebtedness to such of his creditors only as shall release their claims against him, is, in the absence of express statute to the contrary, as by a bankrupt law, or something in the nature of one, fraudulent and invalid; and this, for the reason that it is the duty of an insolvent debtor to apply his property to the payment of his debts as far as it will go, without conditions and without coercing his creditors to surrender any part of their just claims against him as the price of receiving their just share of his estate."

"At common law the assignment in this case is bad again, because, while providing for the payment of such creditors only as shall release their claims, it still further provides for the payment of any surplus to the assignor. The effect is to put that surplus out of the reach of non-releasing creditors like plaintiff, and to create a trust for the benefit of the assignor, to the hindering and delaying of such creditors in the collection of their demands. Truitt v. Cadwell, 3 Minn. 257 (364) (74 Am. Dec. 764); Banning v. Sibley, 3 Minn. 282 (389); 2 Kent, Comm. 534."

"As respects a creditor like the plaintiff, who will have nothing to do with it, the assignment is void; and he may therefore disregard it, and lay hold of the assigned property or its proceeds in the hands of the assignee, by garnishment or otherwise, as the circumstances advise. National Park Bank v. Lanahan, 60 Md. 477; Edwards v. Mitchell, 1 Gray, 239. The assignment, being fraudulent and void as to him, does not have the effect, so far as he is concerned, to place the property purporting to be assigned, or its proceeds, in *custodia legis*, for, as to him, the jurisdictional foundation of an assignment under and in accordance with the insolvent act is wanting."

To the same effect is Edwards v. Mitchell, 1 Gray, 239, where the same question is presented, in a similar case. The court there said:

"But independent of those statutes, an assignment of property to trustees for the benefit of creditors, to which the creditors are not parties, would be void against creditors, by the common law of Massachusetts, as it was understood and administered, before the first of these statutes was passed."

The same rule is laid down in Ingraham v. Geyer, 13 Mass. 146, where an assignment had been made in Pennsylvania for the benefit of all of the creditors of the debtor who should within four months after the assignment file a release of their claims. The assignment was concededly valid in Pennsylvania, but the court of Massachusetts refused to recognize the title of the assignee as against attaching creditors in that state, although the trustee in whose hands the property was had been duly notified of the assignment.

The syllabus reads:

"An assignment of all his effects, by an insolvent debtor in Pennsylvania, in trust for such of his creditors as should within four months release all their demands against him, the surplus to be distributed, pro rata, among his other creditors, and the remainder, if any, to be paid over to the assignor, was holden to be void as against a creditor here, who, after such assignment, and after notice thereof to a debtor here, summoned such debtor as the trustee of the insolvent."

And in the opinion, Chief Justice Parker said:

"This assignment could not be supported, if made within this state by parties residing or living here, and with a view to be here executed. It is voluntary on the part of the debtor, and involuntary on the part of the creditor."

See also Bennett v. Ellison, 23 Minn. 243; Grover v. Wakeman, 11 Wend. 187; Burrill on Assignments, Sec. 195; Barth v. Backus, 40 N. Y. 230.

Under the provisions of the insolvency act of Massachusetts, the assignee or receiver of an insolvent debtor is appointed by the creditors themselves, who control to a large extent the whole insolvency proceeding and the assent of a majority must in every case be had before the debtor can be discharged, unless his estate pays fifty per cent of his indebtedness. Chapter 157, Pub. Statutes of Mass. 1882.

Assuming for the present that the assignment under consideration is in its nature voluntary, it is apparent from a comparison of these assignment laws and from an examination of the decisions of the courts of Massachusetts, that the assignment would not be held effectual by the courts of that state to transfer to the assignee the title

to the personal property in controversy, as against attaching creditors who are citizens of Massachusetts. This, in fact is virtually admitted by the plaintiff in error, but it is insisted that the defendants in error, being citizens of New York, do not stand in the same position as would citizens of Massachusetts under like circumstances.

We are not unmindful of the fact that the Supreme Court of Massachusetts has attempted in the case of voluntary assignments to make a distinction between the rights of attaching creditors who are citizens of that state and those creditors who are citizens of another state (Frank v. Bobbett, 155 Mass., and cases cited); but with all due respect to that able court, we submit that it is not competent for the courts of one state of the union to refuse to citizens of a sister state, who are rightfully before the court, the same rights and privileges as are afforded to its own citizens.

"In the absence of any statutory provision to the contrary, non-residents as well as residents may avail themselves of the proceeding by attachment."

Drake on Attachments, (6th Ed.) 11. Citing McClerkin v. Sutton, 29 Ind. 407; Mitchell v. Shook, 72 Ill. 492; Tryson v. Lansing, 10 La. 444; Posey v. Buckner; 3 Mo. 413; Gray v. Briscoe, 6 Bush. 687.

Some courts even go further and hold that by virtue of Section 2, Article 4 of the United States Constitution, one of the United States cannot provide attachment laws for its citizens which will not be available to the citizens of every other state. Ward v. McKenzie, 33 Tex. 297 (hereafter quoted at

length); but the legislature of Massachusetts has not attempted to do this. Sec. 38, Chap. 161, Pub. Stat. Massachusetts, 1882, provides that:

"'All real and personal estate liable to be taken on execution (except such personal estate as from its nature or situation has been considered exempt according to the principles of the Common Law, etc.) may be attached upon the original writ in any action in which debt or damages are recoverable and may be held as security to satisfy such judgment as the plaintiff may recover."

This provision is general and applies to all suitors, whether citizens or non-residents.

This being so, the court of Massachusetts, in passing upon the conflicting claims of attaching creditors and assignees claiming under foreign assignments, must apply the same rule in determining the rights of non-resident creditors, pursuing their remedies by attachment in the usual course of procedure in the courts of that state, which it would apply were such creditors citizens of Massachusetts. This is a constitutional right secured to every citizen of the United States. Slaughterhouse Cases, 16 Wall.36; Greene v. Van Buskirk, 5 Wall. 307; 7 Wall. 139; Barth v. Backus, 140 N. Y. 230; Lemmon v. People, 20 N. Y. 608; Hibernia Bank v. Lacombe, 84 N. Y. 567; Warner v. Jaffray, 96 N. Y. 248; Ward v. Morrison, 25 Vt. 598; Morton v. Potter, 34 Vt. 87; Rice v. Coates, 32 Vt. 460; Paine v. Lester, 44 Conn. 196; Upton v. Hubbard, 28 Conn. 275; Newland v. Reily, 85 Mich. 151; Kidder v. Tufts, 48 N. H. 121; Sturtevant v. Armsby Co., 23 Atl. R. (N. H.) 368; Ward v. McKenzie, 33 Tex. 297; Cofrode v. Gart-

ner, 79 Mich. 332; Rhaum v. Pearce, 110 Ill. 350; Philson v. Barnes, 50 Pa. St., 230; Morgan v. Neville, 74 Pa. St. 52; Lewis v. Bush., 30 Minn. 244; Jenks v. Ludden, 34 Minn. 482; Lovering v. Paine, 10 Ia. 282; Sheldon v. Blanvelt, 29 S. C. 452; Catlin v. Wilcox, S. P. Co., 123 Ind. 477. See also Ward v. Maryland, 12 Wallace, 163; Paul v. Virginia, 8 Wallace, 177; Ex parte Virginia, 100 U. S. 339; Missouri v. Lewis, 101 U. S. 22; Barbier v. Connolly, 113 U. S. 31.

It is undoubtedly true that the case at bar must be determined according to the law of the state of Massachusetts, by reason of the constitutional provision that

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Art. 4, Sec. 1, U. S. Constitution. And by virtue of the act of congress of 1790, (1 U. S. Stat. 122) which provides that such acts, records and judicial proceedings, when duly authenticated, shall be given the same effect in every other state as they have by the laws of the state from which they are taken.

Greene v. Van Buskirk, 5 Wall 17; 7 Wall. 139.

But this does not require this court to follow the decisions of the court of Massachusetts, which violate the provisions of the United States constitution, which provide that

"The citizens of each state shall be entitled to all the provileges and immunities of the citizens of the several states."

Sec. 2, Art. 4, U. S. Constitution.

And that "No state shall deny to any person within its jurisdiction equal protection of the laws." Sec. 1, of 14th Amndt., U. S. Constitution.

And it is respectfully submitted that if plaintiff in error, claiming title to the property in controversy under this assignment, had intervened in the attachment proceeding brought by the defendants against the Merrill Company in the state of Massachusetts, or taken other appropriate proceedings there to test the title to the property, or had brought an action in the courts of that state against the sheriff of Suffolk county, or against these defendants for damages for the conversion of this property, which would have brought up the same controversy which is pending here, and the courts of Massachusetts should declare that while the assignment in question was invalid and ineffectual for the purposes of transferring to the assignee, the title to the property in question, as against attaching creditors who were citizens of that state, and yet have held it valid and effectual as against the defendants as attching creditors, citizens of the state of New York, such ruling would be erroneous, and the defendants would be entitled to have the judgment of the Massachusetts court reversed, upon appeal to this court, because in violation of Sec. 2, Art. 4 of the United States Constitution, which provides, "that the citizens of each state shall be entitled to all the rights, privileges and immunities of citizens in the several states," and in violation of Section 1 of the fourteenth amendment

which provides that "no state shall deny to any person within its jurisdiction the equal protection of the laws."

Under these provisions of the Constitution the courts of Massachusetts cannot apply one rule of law in behalf of the citizens of its state, and another in behalf of sitizens of another state; solely upon the ground of citizenship.

With the exception of Massachusetts courts the various courts of the Union, except in a few cases in which the question does not appear to have been called to the attention of the court, have given full effect to this constitutional provision.

In Greene v. Van Buskirk, 7 Wallace 139, supra, the court, in speaking of the case of Guillander v. Howe, 35 N. Y. 657, said:

"That case and the one at bar are alike in all respects, except that the attaching creditor there was a citizen of the state in which he applied for the benefit of the attachment laws, while Greene, the plaintiff in error, was a citizen of New York, and it is insisted that this point of difference is a material element to be considered by the court in determining this controversy, for the reason that the parties to this suit, as citizens of New York, were bound by its laws, being citizens thereof. But the right under the constitution of the United States, and the laws of congress, which defendant invokes to his aid, is not at all affected by the question of citizenship. We cannot see why, if Illinois, in the spirit of enlightened legislation, concedes to the citizens of other states equal privileges with her own, in her foreign attachment laws, that the judgment against the personal estate located within her limits of a nonresident debtor, which a citizen of New York lawfully obtained there, should have a different

effect given to it under the provisions of the constitution and the law of congress, because the debtor against whose property it was recovered, happened also to be a citizen of New York."

And in the "Slaughter House Cases" (16 Wall. 36), subsequently decided by this court, this same doctrine is laid down in the most positive terms. Mr. ustice Miller, in delivering the opinion of the court, in treating of this provision of the constitution, said:

"In the case of Paul v. Virginia, 8 Wall. 180, the court, in expounding this clause of the Constitution, says that 'the privileges and immunities secured to citizens of each state in the several states, by the provision in question, are those privileges and immunities, which are common to the citizens in the latter states under their Constitution and laws by virtue of their being citizens.' (And adds) "The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens.

"Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

In Ward v. McKenzie, 33 Texas, 314, it is said:

"It may be assumed that whatever privilege, benefit or advantage, a resident citizen may derive from the provisional remedy of attachment, which has been created by the attachment law of this state, is equally accessible and available to any citizen of

any of the United States, because the constitution of the United States has declared, that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.' All the civil rights and obligations conferred or imposed by the laws of a state, upon its own citizens may be enjoyed and must be submitted to by the citizens of other states, whenever the action of a state tribunal is invoked for their adjustment, or enforcement. It is not a matter of mere comity among states, but it is a constitutional guaranty.

"Whatever of right, then, exists in a resident to proceed by attachment upon such a state of facts as is presented by this record, exists, also, in any citizen of the United States who may seek the interposition of the courts here to enforce his just or equitable demands: If, therefore, a resident citizen, who holds a just claim against a non-resident or absent debtor, can proceed by attachment against such non-resident or absent debtor, whatever be the character of the claim, provided it be a just one; so may a non-resident creditor proceed in the same way, when he shall have complied with the requisitions of the attachment laws."

In Hibernia Bank v. Lacombe, 84 N. Y. 567, supra, Danforth, J., in delivering the opinion of the court, said:

"Once properly in court and accepted as a suitor, neither the law nor the court administering the law, will admit any distinction between a citizen of its own state and that of another. Before the law and in its tribunals, there can be no preferences of one over the other."

In Lemmon v. People, 20 N. Y. 608, supra, the court, in commenting upon the rights secured to citizens of the different states, under these provisions of the constitution, said:

"That the language is that they shall have the same privileges and immunities of citizens in the

several states. In my opinion the meaning is, that in a given state, every citizen of every other state shall have the same privileges and immunities—that is, the same rights—which the citizens of that state possess. In the first place they should not be subjected to any of the disabilities of alienage; they can hold property by the same titles by which every other citizen may hold it, and by no other. Again, any discriminating legislation, which should place them in a worse situation than a proper citizen of a particular state would be unlawful."

In Warner v. Jaffray, 96 N. Y. 248, the court said:

"A foreign creditor has the same rights here against the property of his nonresident debtor, as a resident creditor has."

The New York cases upon this subject were reviewed and discussed in the recent case of Barth v. Backus, 140 N. Y. 230, decided in 1893, and the rule announced in Lemmon v. People, Hibernia Bank v. Lacombe, and Warner v. Jaffray, was reaffirmed. The court said:

"These decisions must be regarded as establishing the law of the state on the subject. And the court added:

"The courts of this state accord to our citizens the same liberty to proceed in another jurisdiction in hostility to assignments executed here, which they accord to citizens of another state coming here and instituting proceedings in hostility to transfers in insolvency, valid by the laws of their domicile."

In Paine v. Lester, 44 Conn. 196, it was said:

"In this case the plaintiff is a citizen of Rhode Island, but the fact does not affect the case. The citizens of all our sister states have, by the constitution of the United States, the same privileges with our citizens, and any one of them who has availed himself of the legal remedies furnished by

our laws to secure payment of the debt due him, has the same claim to the assistance of our courts that one of our own citizens would have."

In Kidder v. Tufts, 48 N. H. 121, the court refused to discriminate in favor of a New Hampshire creditor against a citizen of the state of Massachusetts, both creditors claiming title in hostility to an assignment executed under the laws of Massachusetts. The court said:

"The plaintiffs have availed themselves of their strict legal rights as established and allowed by our statute law, and a practice which has existed for at least a century. For the purpose of making an attachment on property of the defendant here, the plaintiffs may properly be considered subjects of our state government, so long as they submit to our jurisdiction and claim the protection of our laws; and we do no more in allowing them the advantage of their superior diligence than to admit them to the full enjoyment of that privilege so clearly expressed in the constitution of the United States, that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

In Rhaum v. Pearce, 110 Ill. 350, the court citing and commenting upon the decision and the language of the court in Hibernia Bank v. Lacombe, 84 N. Y. 567, said:

"We regard this as the correct doctrine. Under our laws, the courts of this state are open alike to citizens of every state for the enforcement of legal rights, and when a nonresident invokes the aid of our courts to enforce this legal right, interstate comity does not demand that our courts shall give the laws of another state extra-territorial effect here, and to adopt those laws in the administration of justice." (Citing Paine v. Lester, 44 Conn. 196 and Kidder v. Tufts, 48 N. H. 121) "Indeed, we

have the constitutional guaranty that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. Greene v. Van Buskirk, 7 Wallace 139."

In Jenks v. Ludden, 34 Minn. 482, Mitchell, Judge, says:

"Notwithstanding that a contrary doctrine, narrow and provincial, as we think, and of questionable constitutionality, has heretofore some times obtained, yet we think we may lay it down as reasonably well settled that when once in court and accepted as a suitor, neither the law nor the court administering it will make any distinction between citizens of their own state and those of another, but that a citizen of one state, rightfully in court pursuing a remedy given by the laws of our state, may enforce that remedy to the same extent, and with the same superiority of lien as a citizen of the former."

In Ward v. Morrison, 25 Vt. 598, the defendant had made an assignment in New York for the benefit of his creditors, the plaintiff also a citizen of New York, brought suit in Vermont and attached funds of the debtor there situated in the hands of a garnishee. The assignee appeared and claimed a right to the funds by virtue of a foreign assignment. It was contended that the plaintiff being a citizen of New York, where the assignment was made, was subject to the laws of that state, and could not lawfully prosecute his attachment in defiance of the assignment. The court, in its opinion on this branch of the case, said:

"We have no doubt that this debt is subject to our trustee process at the suit of the plaintiff, though a citizen of the state of New York. By the United States constitution the citizens of each state are entitled to all the privileges and immunities of citizens

in the several states, and if we deny to the plaintiffs the use of our courts to enforce their legal rights, whether against our own citizens or others, as fully as they may be used by the citizens of Vermont, for that purpose, there might be ground to complain of a refraction of this provision in the constitution."

In Paul v. Virginia, 8 Wallace, 177, Mr. Justice Field, in speaking of this provision of the constitution, said:

"It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alieage in other states. It inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisation and enjoyment of property, and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the constitution has tended so strongly to constitute the citizens of the United States one people as this."

In the case of Sturtevant v. Armsby Co., 23 Atl. R. 368, decided by the Supreme Court of New Hampshire in 1891, it appeared that one Hanson had made an assignment under the laws of the state of Massachusetts to the plaintiff, Sturtevant, who was also a citizen of that state. The defendant, citizens of Illinois, afterwards brought suit in New Hampshire against Hanson and attached certain property of his found in the state of New Hampshire. Sturtevant filed a bill in equity in the New Hampshire courts to enjoin the prosecution of this action, in-

sisting that as against a subsequent attaching creditor, not a citizen of the state of New Hampshire, the assignment was effectual to transfer to the assignee the title to the property in question. The court said:

"An assignment under the insolvent law of another state is not permitted to prevail against a subsequent attachment by a citizen of this state, of the insolvents' property found here." "But as against subsequent attaching creditors who are citizens of a foreign country, the assignment prevails. Sanderson v. Bradford, 10 N. H. 260. The defendants are not foreigners; they are citizens of Illinois, and as such, when in this jurisdiction, are entitled under the fourteenth amendment of the Federal Constitution, to the equal protection of our laws, (citing cases). They are now in this jurisdiction. They are here lawfully in court as suitors, and in that character entitled to all the rights the law gives to our own citizens. The amendment means that no person or class of persons shall be denied the same protection of the laws, which is enjoyed by other persons or other classes in the same place, under like circumstances." Citing Missouri v. Lewis, 101 U. S. 22, Exparte Virginia 100 U. S. 339, Barbier v. Connolly, 113 U. S. 31, Soon Hing v. Crowley, 113 U. S. 703, Yick Wo v. Hopkins, 118 U. S. 356, Hayes v. Missouri, 120 U. S. 68; Railway Co. v. Beckwith, 129 U. S. 26; Railway Co. v. Pennsylvania, 134 U. S. 232; Railway Co. v. Minnesota, 134 U. S. 418, Paine v. Lester, 41 Conn. 196, Bank v. Lacombe, 84 N. Y. 367.

It has been repeatedly held both by the Federal and State courts, including the State of Massachusetts, that under Section 2, Article 4 of the Constitution, above quoted, the courts of each state are open to citizens of every other state the same as to their own citizens. This is expressly held in the

case of Barrell v. Benjamin, 15 Mass. 354. In that case the plaintiff was a citizen of Connecticut, the defendant was a foreigner, and the point was made that the court had no jurisdiction of the action. The court said:

"The plaintiff is a citizen of the United States having his domicil in Connecticut. By the second section of the fourth Article of the Constitution of the United States, that 'the citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states,' since the adoption of the constitution, the citizens of Connecticut or any other state of the Union cannot be considered as foreigners, and indeed are not so considered practically, in any of the courts of law. It will be admitted that a citizen of Massachusetts has the privilege to sue any foreigner who may come within this state. If so, a citizen of Connecticut has the same privilege secured to him by the Constitution. An argument which might be plausable if used against a foreigner cannot prevail against the defendant, who has none of the disabilities of a foreigner attending him."

But of what advantage would this constitutional privilege of a citizen of one state to bring a suit in another jurisdiction be, if the court where such suit was brought should be at liberty to and actually insist on applying to him a different rule of law to that applied to its own citizens.

This same question was asked in the case of Suidam v. Broadnax, 14 Peters 67, in which it was insisted that by virtue of a statute of Alabama exempting administrators from suit, that such administrator could not be sued in the Circuit Court of the United States by a resident of another state, notwithstanding the provision of Article 3, Section

2 of the Constitution of the United States, which gives the Circuit Court of the United States original cognizance concurrent with the courts of the several states, of certain classes of cases, among which are cases in which "the suit is between a citizen of a state where the suit is brought and a citizen of another state," etc. The court, by Justice Wayne, said:

"It was certainly intended to give to suitors having a right to sue in the Circuit Court, remedies coextensive with these rights. These remedies would not be so if any proceeding under an act of the state legislature to which plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the Circuit Court.

If it be conceded that a voluntary assignment for the benefit of creditors, valid in the state where made, is effectual to pass to the assignee thereunder the title to personal property of the assignor situated in another state, yet the assignment under consideration can have no such effect for the reason, if for no other, that it was made under and pursuant to the provisions of an act of the legislature of the state of Minnesota, which is not merely declaratory of the common law, as is the Minnesota assignment act of 1887, but which in effect is a bankruptcy act. An assignment made pursuant to the provisions of this act (Chap. 148, Laws of 1881, as amended by the law of 1885 and 1889, now Chap. 41, Gen. Stats. of 1894, Title 5), is compulsory in its nature and cannot be said to be a voluntary assignment in the sense in which the term is used by the courts in speaking of voluntary assignments, which being valid where made may be inforced in another state.

Section 1 of the act provides, in substance, that when a debtor shall have become insolvent, or when his property shall have been levied upon by virtue of an attachment, execution, or legal process issued against him for the collection of money, or garnishment shall have been made against him, he may make an assignment of all his unexempt property for the equal benefit of all his creditors, who shall file releases of their demands against him, as therein provided, and such assignment, if made within ten days after a garnishment shall have been made or within ten days after his property shall have been levied upon, under legal process against him for the collection of money, shall operate to vacate every such garnishment and levy then pending, and to discharge all property from such levy or garnishment.

Section 2 of the act provides, that if any insolvent debtor shall confess judgment, or do any act whereby any of his creditors, shall obtain preference over any other of his creditors, or shall omit to do anything which he might lawfully do to prevent any of his creditors from obtaining preference over any of the other of his creditors, or shall not make an assignment under the first section of the act within ten days after garnishment made against him, or within ten days after levy made on any of his property, then any one or more of his creditors having claims against him to the aggregate amount of at least two hundred dollars, may petition the District Court or a judge thereof, asking for the appointment of a receiver of the unexempt property of such debt-

or, and if it shall appear that such insolvent debtor has omitted to do anything which he might have lawfully done to prevent any of his creditors from obtaining preference, or that he has not made an assignment under the first section, after garnishment made or process levied on his property, then the court shall appoint a receiver to take possession of all the property of such debtor, and distribute the net proceeds thereof ratably and in proportion to the amount of their several demands, among the creditors of such debtor, who shall come in and make due proof of their respective claims and demands within such time and in such manner as the court shall direct, and who shall in consideration of the benefits of the provisions of the act, execute and file releases of their respective demands against such debtor, except to the extent that they shall receive payment thereof from the proceeds of such estate.

Section 3 provides that "if any insolvent debtor shall confess or suffer judgment to be procured in any court with intent that any one of his creditors shall obtain a preference over any other of his creditors, such insolvent debtor shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding five hundred dollars ($500), and in default of payment shall be imprisoned in the county jail for a period not exceeding six months."

The Supreme Court of Minnesota construing this statute holds that when a debtor, who is insolvent, is sued upon a claim as to which he has no bona fide defense, it is his duty, under the statute, to prevent a preference by making an assignment before the

proceedings for the collection of the debt have reached the stage where he cannot prevent the preference.

"If he willfully fails to perform his duty, it must be held that he intended the consequences of his own unlawful omission, that he intended to permit such creditor to take a preference, that he intended such creditor should have a preference. The judgment lien so obtained is a 'security given' by means of an intentional failure on his part to perform his duty. Clearly a preference so obtained by his unlawful act must be held to be an unlawful preference on the part of the insolvent debtor. The case of Wilson v. City Bank, 17 Wall. 473, is not in point. There is a material difference between the language of the bankruptcy act and our insolvent law. As construed by the court in that case, the bankruptcy act does not impose upon the insolvent debtor the duty of preventing preferences among his creditors, it goes no further than to prohibit him from actively participating in the procurement to the creditor of such a preference. It permits him to remain passive while the creditor is, by process of law, obtaining a preference; our statute does not."

Yanish v. Pioneer Fuel Co., 60 Minn. 321.

The act further provides that the court may for any proper cause remove the assignee and appoint another in his stead, and shall do so upon the petition of a majority in number and amount of the creditors of such insolvent debtor, and shall thereupon appoint the person specified in the petition of such creditors, if the court believes him to be a proper person, as assignee or receiver of said insolvent's estate. All attachments and levies previously made upon the debtor's property, with a single exception not important here, are dissolved upon the appointment and qualification of an assignee or

receiver, and all proceedings under the act are had under the direction of the District Court or a judge thereof, who is vested with large discretionary powers in the matter of practice.

Wendel v. Lebon, 30 Minn. 234.

Upon the perfecting of the assignment, and to some extent at least, upon the simple execution of it by the assignor, its entire subject matter and everything involved in it, including the assigned property, come under the jurisdiction of the District Court ipso facto, and without the institution of any suit or proceedings, and by consequence, the assigned property is then in custodia legis.

In re Mann, 32 Minn. 412.

The Supreme Court of Minnesota has had occasion in a number of cases to construe this statute, and has repeatedly held that upon the execution and filing of an assignment, or the appointment of a receiver under its provisions, the property is in custodia legis and that the act itself is, in its essential features, a bankrupt act. Wendel v. Lebon, 30 Minn. 234; In re Mann, 32 Minn. 60; Lord v. Meacham, 32 Minn. 66; Simon v. Mann, 33 Minn. 412; Bennett v. Denny, 33 Minn. 530; Jenks v. Ludden, 34 Minn. 482; Daniels v. Palmer, 35 Minn. 347.

In Jenks v. Ludden, supra, the court, in discussing the question as to what, if any, force or effect should be given to an assignment made under the provisions of this act, by the courts of another state, says: "Our insolvent law and the statute of Wisconsin regarding asignments for the benefit of cred-

itors are essentially different. Our act of 1881 is, as we have repeatedly held, a bankrupt act, the assignee being in effect an officer of the court, and the assigned property being in custodia legis to be administered by the court or under its direction."

Again, in the case of Daniels v. Palmer, supra, the court, in discussing the meaning of the term "insolvency" as used in the act of 1881, says:

"That our statute is a bankrupt law has been repeatedly held by this court. Wendell v. Lebon, 30 Minn. 244; In re Mann, 32 Minn. 60; Simon v. Mann, 33 Minn. 412; Jenks v. Ludden, 34 Minn. 482. And when the legislature, in such an act, employed terms which had acquired a certain and well understood meaning as used in the various bankrupt acts of both England and the United States, it is to be presumed that they used them in the same sense." The construction placed upon this act by the Supreme Court of Minnesota in these cases is abundantly sustained by the decisions of the courts of other states, construing this and other statutes containing similar provisions, Barth v. Backus, 140 N. Y. 230; McClure v. Campbell, 71 Wis. 350; Holton v. Burton, 78 Wis. 321; Hempsted v. Bank, 78 Wis. 375; Boese v. King, 78 N. Y. 471; Franzen v. Hutchinson (Ia.), 62 N. W. 698; Weider v. Maddox, 66 Tex. 372 (1 S. W. 168).

In the case of Barth v. Backus, decided by the New York Court of Appeals in November, 1893, the assignee of a Wisconsin corporation, under an assignment for the benefit of creditors made in that state, sought to recover possession of certain of the assets of the insolvent corporation situated within

the state of New York, and which had been attached, subsequent to the assignment, by the defendants to secure their claims against the insolvent debtor. It appeared that the indebtedness on which the attachment suit was based was originally owing to a Wisconsin creditor, who had subsequent to the assignment, transferred the claim to the attaching creditor, who was a citizen of the state of New York. The insolvency law of Wisconsin, pursuant to which the assignment was made, as amended in 1889, contains provisions substantially the same as our act of 1881. Andrews, Chief J., in discussing the effect to be given to this Wisconsin assignment, said:

"The general question in this case, involves the point whether the assignment made by the Wilcox Manufacturing Co. under the statute of Wisconsin is to be treated as a voluntary assignment not in conflict with our laws or policy, or whether, in view of the compulsory clauses of that statute, it is to be regarded in the nature of a bankruptcy law and ineffectual to transfer title to the property of the insolvent in our jurisdiction as against attaching creditors. In considering whether the title of the assignee in Wisconsin is paramount to the claims of creditors here, who, subsequent to the assignment procured attachments against the debt owing to the Wilcox Manufacturing Co. by the Canton Lumber Co., a reference to the Wisconsin statute, under which the assignment was made becomes important. The original Wisconsin statute upon the subject of voluntary assignments by failing debtors was similar to the statute of this state upon the same subject. It was a statute prescribing the conditions of such assignment, and regulating the administration of the trust for the protection of creditors. In 1889 radical changes were made in the statutory system of Wisconsin, and the prior statute was amended. The amendments among other things, provided that the assignor in a voluntary assign-

ment for the benefit of his creditors, made under or in pursuance of the laws of the state 'may be discharged from his debts as a part of the proceeding under such assignment, upon compliance with the provisions of this act.' It further declared that every creditor of an insolvent debtor, residing within or without the state, who should accept a dividend out of the assigned estate, or in any way, by proving his claim or otherwise, participate in the proceedings under the assignment shall be 'deemed to have appeared in the matter of such assignment, and the application for a discharge, and shall be bound by any order of discharge granted by the court' subject to the right of appeal. Under the statute, a creditor, by accepting a dividend, thereby consented to a discharge of the debtor from the portion of the debt remaining over and above his share of the assets; and, unless a creditor comes in under the assignment, he is debarred from receiving anything out of the assigned property, unless indeed, a surplus should remain after payment of the participating creditors in full, although it seems the debt would remain as a claim against the insolvent. The power to discharge a contract without payment or satisfaction, without the consent of the creditors, is a power which pertains to the sovereign alone. The statute of Wisconsin does not assume to discharge the debts owing by the insolvent assignor absolutely. But, as has been said, it deprives creditors who do not come in under the assignment of a share in the assigned estate, unless in the improbable contingency of a surplus. This coercive feature of the scheme, if contained in a voluntary general assignment for the benefit of creditors, would render the assignment void; (Grover v. Wakeman, 1 Wend. 189). Effect cannot be given here to this coercive feature in the Wisconsin law, except by giving extra-territorial effect to the law of that state. The assignor had no power to make such a condition, and, if it is legal, it is by force of the Wisconsin statute alone. This feature is one of the distinguishing tests of an insolvent or bankrupt law. The assignment was voluntary in the sense that the Wilcox Manufacturing Co. were not coerced into

executing it, and the title to the property was vested in the assignee by its own act, but whether it is to be treated as voluntary in another jurisdiction when the claims of creditors there are in question, is the point. The assignment purports to have been made under and in pursuance of the law of Wisconsin. The assignor, by proceeding under that law, presumably designed to avail itself of the provisions for a discharge. This can only be accomplished by force of the law. The right of an insolvent or bankrupt to initiate voluntary proceedings in bankruptcy is a common feature to bankrupt laws, but that fact does not make the assignment voluntary, so as to give extra territorial operation to the proceedings. This point was adverted to in the case of Upton v. Hubbard, 28 Conn. 274, where the court said, 'in our view, there is essentially no difference whether in consequence of an act of bankruptcy as in England, the bankrupt's estate is forced from him, or he, himself, sets the law in motion by a conveyance in bankruptcy in the first instance. Under the Wisconsin statute, the transfer is voluntary, but the law then steps in and regulates the distribution of the assigned estate in accordance with conditions which the sovereign alone can impose. It would, we think, be disregarding the substance to hold that this voluntary feature of the law distinguishes it from the class of bankrupt or insolvent statutes which, by general consent, in this country, are held to be ineffectual to transfer the title of the insolvent to property in another state, as against attaching creditors there."

The Supreme Court of Illinois in a case decided in June, 1894, had occasion to construe the statute of Wisconsin on the subject of insolvent debtors, and arrived at the same conclusion in regard thereto announced by the Court of Appeals of New York. After calling attention to the provisions of the act providing for the discharge of the insolvent debtor, the court said:

"It is manifest that a creditor of an insolvent debtor in Wisconsin, who makes a voluntary assignment, valid under the laws of that state, can only avoid a final discharge of the debtor from all liability on his debt, by declining to participate in any way in the assignment proceedings. He is therefore compelled to consent to a discharge as to so much of his debt as is not paid by dividends in the insolvent proceeding, or take the hopeless chance of recovering out of the assets of the assigned estate remaining, after all claims allowed have been fully paid.' "We think the fact that the insolvent debtor is not coreced into the execution of the deed of assignment is not of controlling importance when the question as to whether it shall be treated as a voluntary assignment arises in another jurisdiction, between the assignee and creditors of the insolvent. If the Hadfield Co. had attempted to write into this deed of assignment, that part of the statute of Wisconsin by which it may obtain a discharge against creditors filing their claims, the assignment would have been clearly void at common law.' "As said in Conklin v. Carson, 11 Ill. 508, 'a debtor in failing circumstances has an undoubted right to prefer one creditor to another, and to provide for the preference by assigning his effects; but he is not permitted to say to any of his creditors that they shall not participate in his present estate, unless they release all right to satisfy the residue of their debts out of his futrue acquisitions.' If this appellant had set up in his interpleader a voluntary deed of assignment containing a condition for the release of the assignor as to creditors who should file their claims, he would have been met with the objection that such an assignment is void in Illinois. Is he in any better position in asking the court to give effect to an assignment made under the statute of another state, which gives the right, and provides all the means by which the debtor may make such release? We think not. In either case, the assignment controvenes the plain and well settled law of this state. As we said in Woodward v. Brooks, 128 Ill. 222, 'but if the foreign assignment, if made here, would be set aside as fraudulent or contrary to the policy of

our laws, our courts will not enforce it as against attaching creditors, whether foreign or domestic, although it may be valid in the state where made."

Townsend v. Coxe, 151 Ill. 62 (37 N. E. 639).

In the case of Weider v. Maddox, supra, the court defines voluntary asignments, as that expression is used in the books, to be such as are the products of a will acting without legal compulsion, and distinguishes such assignments from those made solely by operation of law or by an assignor under legal compulsion. The court said:

"The one has such effect as other contracts, while the other has effect solely by force of the law which makes or compels the assignor to make the assignment. This difference it is important to observe when considering the effect to be given an assignment in a state other than that in which it is made. If it be an assignment under a compulsory statute, it stands alone by force of the law, which cannot operate extra-territorially. The law is compulsory if it requires the assignment to be made, even at the request of creditors, or if it provides for the discharge of claims of creditors without their consent, upon a voluntary surrender by the debtor under the terms of the law, of all his property for the benefit of creditors. State insolvent laws, which compel the insolvent debtor to surrender his property to an assignee to be administered under the direction of a court, for the benefit of creditors, and which compel the creditor to release the debtor on such surrender, are instances of these classes." Citing Wharton on Conflict of Laws, 390, Story on Conflict of Laws, 410-416, Burrill on Assignments, 303, Ogden v. Saunders, 12 Wheat. 213, Harrison v. Sterry, 5 Cranch. 302, U. S. v. Bank, 8 Rob. (La.) 414 Hutchinson v. Peshine, 16 N. J. Eq. 167, Felsh v Bugbee, 48 Me. 9, Walters v. Whitlock, 9 Fla. 95, Willitts v. Waite, 25 N. Y. 583, Holmes v. Remsen, 20 Johns. 265, Abraham v. Plestero, 3 Wend. 538, Dalton v.

Currie, 40 N. H. 247; Saunders v. Williams, 5 N. H. 214, Blake v. Williams, 6 Pick. 285.

In McClure v. Campbell, 71 Wis. 350, the co-partnership firm of Gillespie and Harper, citizens of Minnesota, and doing business in that state, made an assignment to the plaintiff McClure for the benefit of their creditors, under the provisions of the Minnesota statute (Chap. 148, Laws of 1881). Subsequent to the assignment, one Johnson ,also a citizen of Minnesota, commenced an action against Gillespie and Harper, in the Circuit Court of St. Croix county, Wisconsin, and attached certain personal property belong at the date of the assignment, to the insolvent debtors, and situated in the state of Wisconsin. The property attached was in the actual custody of the assignee. Judgment was rendered against the defendants, and the attached property was sold under an execution issued on such judgment. The assignee brought suit in the Wisconsin courts against the sheriff for the recovery of the property. The circuit court held that the plaintiffs obtained under the assignment no title to the property in the state of Wisconsin, so seized under the writ of attachment, and gave judgment for the defendants. On appeal to the Supreme Court this judgment was affirmed. Lyon, J., in delivering the opinion of the court, called attention to the decisions of the Supreme Court of Minnesota, construing the act under consideration, and said:

"Thus it will be seen that although an assignment under Chap. 148 of the statutes of Minnesota for 1881, in a certain sense is voluntary, in that the debtor is not compelled to make it, a feature com-

mon to many, perhaps most insolvent laws, including those of this state, yet that court holds it to be in substance and legal effect, an assignment by operation of the statute, thus held to be a bankrupt law, executed as a part of the procedure in the administration of that law. We regard the above adjudication of the Supreme Court of Minnesota, in the construction of their act of 1881, as binding upon this court, and hence shall not examine or discuss the argument of counsel of plaintiff against the accuracy of such construction. We will only say that our consideration of the subject has inclined us to think that the court construed the act correctly."

The Supreme Court of Iowa in the case of Franzen as assignee of the St. Paul German Ins. Co. v. Hutchinson, 62 N. W. 698, came to the same conclusion announced by the Supreme Court of Minnesota and by the Supreme Court of Wisconsin. The court, Deemer, J., said: 'The statute of Minnesota referred to, makes an assignment thereunder practically an assignment in bankruptcy, and as such is contrary to the policy of our laws, and will not be enforced in this state." "We will not give extra teriitorial effect to the assignment under which plaintiff claims the right to sue."

Thus it will be seen that not only has the Supreme Court of the state of Minnesota construed the statute under which this assignment was made, to be a bankrupt act, but we have also the decision of the Supreme Court of Wisconsin, and the Supreme Court of Iowa, giving the same construction to the act in question, and in addition to this, decisions by the Court of Appeals of New York and by the Supreme Court of Illinois, giving the same construction to similar provisions contained in the insolvent law of the state of Wisconsn. To the same effect is Weider v. Maddox, 66 Tex. 373, above quoted.

If, as we think, we have conclusively shown, the Minnesota statute under which the assignment in question was executed, and upon which it must depend for its validity, is in effect a bankrupt act, then the assignment has no force or effect beyond the territorial limits of the state of Minnesota, as against the conflicting rights of non-resident creditors.

It may be, and it doubtless is, true as contended by plaintiffs in error, that the assignment is effectual as between the assignor and assignee, and is valid as to creditors (if any), who assented to its provisions before the attachment, and is sufficient to authorize the assignee, in the absence of objection by non-assenting creditors, to take possession of the property of the assignor wherever located. But as to creditors who have not assented, it is absolutely void by the laws of Massachusetts, as to property there situated, not only as to property which has not been reduced to possession by the assignee, but as to property actually in its hands, beyond the aggregate amount of the claims of creditors who have become parties to the assignment. These propositions are expressly laid down in the case of Bradford v. Tappan, 11 Pick. 76, cited and quoted with approval in the case of Pierce v. O'Brien, 129 Mass. 314.

The American authorities almost unanimously hold that a statutory assignment or an assignment made pursuant to the provisions of a bankrupt act, has no extra territorial effect. In nearly all of them the distinction between a purely

voluntary assignment, such as would be good at common law, and an assignment made pursuant to some express legislative act of a particular state, differing essentially from a common law assignment, is clearly pointed out. A voluntary assignment is held to be in the nature of a contract, and is in substance a transfer of the assignor's property to the assignee, with the condition attached that the assignee shall distribute the same, or the proceeds thereof, among the several creditors of the assignor, either in designated proportions or pro rate among all his creditors. On the other hand, it is held that a statutory assignment is in effect an assignment by operation of the law of the state where made, and can have no effect as a matter of law upon property either real or personal, situated in another state. In some of the states, a foreign assignee under an involuntary or statutory assignment, good by the law of the state where made, is permitted to come into another state and take possession of the personal property of his assignor there situated, and to withdraw it from control of that state and its laws, in the absence of any objection thereto by any of the creditors of the assignor who have not assented to the assignment. But this is done merely as a matter of courtesy or comity, and not, as has been shown, as a matter of abstract right. In such cases the assignee takes the property subject to every equity belonging to attaching creditors, and subject to the remedies provided by the laws of the state of the situs, and when they are permitted to sue in a foreign state, it is not as assignees having

an interest, but as the representative of the bankrupt. They stand upon the footing of administrators only, with a right to sue for the benefit of all the creditors.

Story on Conflict of Laws (8th Ed.), 411.

Mine v. Moreton, 6 Binney (Pa.), 368.

Upton v. Hubbard, 28 Conn. 273.

Paine v. Lester, 44 Conn. 196, and other cases above cited.

In Barth v. Backus, 140 N. Y. 230, the question under consideration was whether an assignment made under the insolvent law of the state of Wisconsin, was valid and effectual to transfer to the assignee the title to personal property situated in the state of New York, as against a subsequent attachment levied by a Wisconsin creditor in the courts of New York. The court holding the Wisconsin statute under which the assignment was made, to be in the nature of a bankruptcy act, held that the assignment was void and ineffectual to transfer to the assignee the title to the personal property of the debtor having its actual situs in that state, as against the rights of the attaching creditor, although the attachment proceedings were instituted subsequent to, and with notice of the assignment. The court, Andrews, Ch. J., said:

"The general rule that the validity of a transfer of personal property is to be governed by the law of the domicile of the owner, is in most jurisdictions held to apply to a transfer by voluntary assignment by a debtor of all his property for the benefit of creditors, as well as to specific transfers by way of ordinary sale or contract, and the title of such as-

signee valid by law of the domicile, will prevail against the lien of an attachment issued and levied in another state or country subsequent to the assignment, in favor of a creditor there, whether a citizen or non-resident, upon a debt or chattel belonging to the assignor embraced in the assignment, provided the recognition of the title under the assignment would not contravene the statutory law of the state, or be repugnant to its public policy. The decisions are not uniform, but this is the general rule, supported by the preponderating weight of authority, and is the settled law of this state."

But this general rule is subject to a qualification established in the jurisprudence of the American states, that a title to personal property acquired in invitum under foreign insolvent or bankrupt laws, good according to the law of the jurisdiction where the proceedings were taken, will not be recognized in another jurisdiction where it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor, although the proceedings were instituted subsequent to, and with notice of the transfer in insolvency or bankruptcy." "This exception proceeds upon the view, that to give effect to such a transfer arising by operation of law, and not based upon the voluntary exercise by the owner of the jus disponendi, would be to give the foreign law extra-territorial operation, which the rule of comity ought not to permit to the prejudice of suitors in another jurisdiction. The cases in this state, since the case of Holmes v. Remsen, 4 John Ch. 460, in which the Chancellor sought to maintain the English doctrine on the subject, have uniformly sustained the right of domestic attaching creditors against a title under a prior statutory assignment in another state or country, the several states of the Union being treated for this purpose as foreign to each other." Citing Willetts v. Waite, 25 N. Y. 577; Johnson v. Hunt, 23 Wend. 87; Kelly v. Crapo, 45 N. Y. 87.

In McClure v. Campbell, 71 Wis., supra, the court

having determined that the Minnesota statute under which the assignment in that case was made, was in effect a bankrupt act, said:

"The only remaining question, and it is the controlling question in the case, is, has an assignment of property, made pursuant to a bankrupt act, the assignee being in effect an officer of the court, and the assigned property being in custodia legis, and administered by or under the direction of the court, any extra-territorial effect? That is to say, should the courts of this state recognize such an assignment as a valid transfer to the assignee of personal property in this state, and thus defeat an attachment levied upon it, pursuant to the laws of this state by a creditor of the assignor? We think the question is not affected by the fact that the property, when seized, was in the possession of the assignee, or that the attaching creditor is a resident of the state in which the insolvency or bankruptcy proceedings were had. The cases on this subject are very numerous. No review of them will be here attempted. While some of them may, under special circumstances, extend the rule of comity to such a case, and thus give extra-territorial effect to somewhat similar assignments, we are satisfied that the great weight of authority is the other way. The rule in this country is, we think, that assignments by operation of law in bankruptcy or insolvency proceedings, under which debts may be compulsorily discharged without full payment thereof, can have no legal operation out of the state in which such proceedings were had."

In Johnson v. Hunt, 23 Wend. 87, decided in 1840, Mr. Justice Cowan said: "The current of the decisions, as I understand it, is, that an assignment in invitum under the laws of the one state or nation, has no operation in another, even with respect to its own citizens."

The court, speaking of the case of Ogden v. Sanu-

ders, 12 Wheat. 358, further said: "I have examined that opinion, and as I understand it, all these assignments coerced by foreign laws are placed on the same footing, including even those which result in a discharge of the bankrupt's contracts." "The law which compels the assignment has no extra-territorial force. Its voice cannot be heard, and there is no atmosphere which it can breathe in a foreign soil. It there becomes a dead letter."

In the case of Willetts v. Waite, 25 N. Y. 577, an Ohio corporation, engaged in the business of banking in that state, having become insolvent, receivers were appointed under the provisions of an insolvent act of the state of Ohio. Subsequent to the assignment various creditors instituted suit in the Superior Court of New York, and attached certain funds of the insolvent bank on deposit in the American Exchange Bank of New York. The receivers made a demand upon the American Exchange Bank for the funds in question, and their demand being refused, commenced an action against the bank to recover the same. The plaintiff commenced an action against the receivers and other creditors who had subsequently attached the funds, to compel the receivers to interplead, and to obtain an adjudication of the rights of the respective parties. Judgment having been entered sustaining the title of the attaching creditors, against the receivers, the case was subsequently, upon their appeal, presented to the Court of Appeals for its consideration. The Court, by Sutherland, J., said:

"It may be conceded that, as between the receivers and the insolvent bank, the statute vested in the receivers on their appointment

the title to the funds in question, in the American Exchange Bank; but as the Ohio statute and the proceedings under it, could have no force or operation in this state, except such as might be conceded to it by the authorities and courts in this state, on the principle of comity, it follows that such title must be deemed to have vested in such receivers subject to the control and authority of the courts of this state over the funds under the laws and regulations of this state. The question, then, is one of comity, to be settled by the decisions of the courts of this state, as determining how far they will recognize a foreign involuntary bankruptcy proceeding." The court citing Holmes v. Remsen, 20 John. 259, and Abraham v. Plestero, 3 Wend. 590, and 1 Paige Ch. 236, concluded, "The same principles apply to bankruptcy proceedings under a statute of one of the states of the union." Citing Johnson v. Hunt, 23 Wend. 87, Hoyt v. Thompson, 19 N. Y. 224. Allen, J., concurring, reviewed more at length the decisions of the various state and federal courts, and in the course of his opinion said:

"The title of the claimants, Waite and Young, was a title by an act and operation of law, by the voluntary act and transfer of the owner. The law distinguishes between these two classes in determining the effect to be given to transfers of movable property at the time actually within a jurisdiction foreign to that of the owner." "By a sort of fiction, that which is known as personal property adheres to the person, and has no fixed situs, and hence the maxim 'Mobilia sequunater personam,' and the law which governs the person of the owner will control as to the disposition or transmission of it. But not so as to devolution of title by act and operation of law, whether by forfeiture, bankruptcy, insolvency, or otherwise. In such case, the transfer depending upon positive law, is only operative where such law prevails, and is obligatory; and as the laws of a state or government have no extra territorial force, it follows that title to property in one state does not pass by virtue of a law of a foreign state, although it be the state and domicile of the

owner. The law operates, if at all, in rem, and the state by whose legislation it is enacted having no jurisdiction over property without its territorial limits, it is entirely inoperative in respect to it. A quasi effect may be given to the law as a matter of comity and interstate or national courtesy, when the rights of creditors or bona fide purchasers, or the interests of the state do not interfere, by allowing the foreign statutory or legal transferee to sue for it in the courts of the state in which the property is; but he is regarded in such cases as representing the owner, and to this extent effect is given in one state or country to the laws of another. This has come to be the well established rule of this state, the United States, and most of the states of the union, and although it differs essentially from the rule in Great Britain and other countries of Europe, it is no longer an open question here."

In the case of Upton v. Hubbard, 28 Conn. 275, the court holds that foreign assignees are classed with foreign executors, administrators, and guardians, who, having title, right or power by mere operation of law, have it co-extensive only with the sovereignty or state which gives it, and hence the court says:

"It follows that such title, right and power, have no existence in another sovereignty and are not of course recognized, though they are admitted in certain cases as a matter of courtesy. This doctrine is familiar to every lawyer, in the case of foreign executors and administrators, and we can see no reason why it is not equally true as to foreign assignees. They are mere agents of the law—instruments of the government, to settle the affairs of a deceased or bankrupt debtor. And, in our view, there is essentially no difference, whether, in consequence of an act of bankruptcy, as in England, the bankrupt's estate is forced from him, or he sets the law in motion himself by a conveyance in bankruptcy in the first instance. It is a local gov-

ernmental proceeding.' "The attaching creditors, by pursuing the steps of our law, certainly acquired a lien upon the debt due from Hubbard, which no foreign proceeding under the bankrupt law of Massachusetts can destroy or impair without allowing an extra-territorial effect to the law of that state in conferring title upon the assignees; which we cannot do. The right of the attaching creditors to the lien obtained by their attachments being good here, must remain good, and we see no reason why they may not enforce that lien by prosecuting their suit to judgment and execution, which is the only positive mode of realizing anything from the lien, known to our law."

To the same effect is Milne v. Moreton, 6 Binn. Pa. 353.

In the case of Paine v. Lester, 44 Conn. 196, supra, the court discussing the general principle applied by the English and American authorities, that personal property having no situs is subject to the laws of the owner's domicile, and can be transferred by a voluntary assignment of sale made by him in accordance with the laws of his domicile, says: "While fully admitting this general principle, the American cases, instead of starting from it, in entering upon the discussion, start from another equally well settled principle, that the laws of a state or country have no legal effect beyond the limits of its territory. This being so, they regard the giving effect to the laws of a sister state or foreign country, in the case of the transfer of, or succession to personal property, within their own limits, as wholly an act of comity, and not a recognition of a right. This comity they are prepared to extend where there is no reason to the contrary, especially if there is no interest of their own citizens or of the citizens of a sister state, who are seeking to avail themselves of the protection of their laws, to be inju-

riously affected by such recognition." Citing numerous cases.

In the case of Catlin v. Wilcox S. P. Co., 123 Ind. 477, it appeared that a citizen of Illinois had been adjudged insolvent by the courts of that state, and a receiver appointed in the insolvency proceedings, who was by order of the court vested with the title to all of the property of the insolvent debtor, wherever the same might be situated. Subsequent to the appointment of the receiver, the Wilcox Silver Plate Company, a citizen of the state of Connecticut, brought an action against the insolvent debtor in the courts of Indiana, and garnished an indebtedness owing to the insolvent by a citizen of that state. The Illinois receiver, claiming title to the funds in the hands of the garnishee ,intervened by elave of the court. The Supreme Court in disposing of the case, said:

"The controversy, as will appear, involves the right to the funds in the hands of the garnishee-defendant, and the question presented is, are the rights of the non-resident attaching creditors paramount in the courts of this state to those of the receivers of the Superior Court of Cook county, whose appointment antedates the issuing of the writ of attachment? The solution of the question depends upon the extent of the power which the courts of general jurisdiction in one state, can exercise over property whose actual situs is within the jurisdiction of the courts of a foreign state. A receiver is nothing more than an officer or creature of the court that appoints him. His acts are those of the court whose jurisdiction may be aided but in no wise enlarged or extended, by his appointment. His power is only co-extensive with that of the court which gives him his official character. While it has

been held that a court may appoint a receiver and authorize him to take possession of property in a foreign jurisdiction, the doctrine is universal that the appointment confers no legal authority which the receiver can exert over the property without the aid of the courts in whose jurisdiction it is found. The appointment, of its own force, gives him the right to take possession of the property, but it confers upon him no power to compel the recognition of that right out side the jurisdiction of the court making the appointment. While there are authorities of great weight, which seem to hold that a receiver appointed in one jurisdiction will not be permitted to maintain a suit in a foreign state, the generally prevailing doctrine upon which all the decisions seem to be harmonious, is, that upon the principles of comity the courts or jurisdiction in which the property or fund is situated, will recognize the rights of the receiver, so far as to aid him in reducing it to possession, unless to do so would in some way violate the local policy or interfere with the rights of resident creditors. "But the recognition of well established principles of comity and courtesy between courts of different jurisdictions is one thing, while the the rights of resident or other attaching creditors who are seeking to avail themselves of legal proceedings, authorized by the statute of the state, for the appropriation of the fund belonging to a non-resident debtor, must be determined upon altogether different principles. As has in effect been said, courts are prepared to extend comity where there is no reason to the contrary; especially if there is no interest of their own citizens or of the citizens of another state, who are asking the protection of their laws, injuriously affected by such recognition." Citing Paine v. Lester, 44 Conn. 196; Milne v. Moreton, 6 Binn. 361. "While it is true, as has been remarked before, the domicile of the owner under legal contemplation, draws to it his personal estate, wherever it may be, yet as this is so only by fiction of law, the rule is not of universal application. When, by the law and policy of the state where the property is actually located, it is subject to the process of attachment

or garnishment at the suit of a domestic or other creditor, the fiction yields and the actual situs of the property determines whether or not it should be subjected to the process of the court:" Citing Warner v. Jaffray, 96 N. Y. 248; Green v. Van Buskirk, 7 Wallace 150; Guillander v. Howell, 35 N. Y. 657; Faulkner v. Hyman, 143 Mass. 53; Moore v. Church, 70 Ia. 208; Weider v. Maddox, 66 Tex. 372; Rhaum v. Pearce, 110 Ill. 350; Walters v. Whitlock, 9 Fla. 86.

The decision of the Massachusetts courts are in entire harmony with the rule which is clearly and unequivocally announced in these cases.

In Taylor v. Columbia Ins. Co., 14 Allen 353, the plaintiff, a citizen of Massachusetts, brought an action against a New York corporation for the recovery of a debt, and attached a fund due to the corporation by another Massachusetts citizen upon certain promissory notes. It appeared by the disclosure of the trustees that the defendant corporation had been adjudged insolvent and receivers appointed by the courts of New York, and further that an action had been brought by these receivers upon the notes in question in the courts of that state. The receivers also intervened in the attachment proceedings in Massachusetts, claiming the fund in the hands of the trustees. The court said: "The real question therefore, is whether the assignment of the property of the corporation to receivers under judicial proceedings in New York, can prevail against this attachment. This question is conclusively settled by authority. The effect of foreign laws beyond their own jurisdiction depends solely upon the comity of the state in which their application is invoked. The general rule is everywhere admitted

that the transfer of personal property, wherever situated, is to be governed by the law of domicile of the owner. But the exception is equally well established in this country that when, upon the insolvency of a debtor, the law of the state in which he resides, assumes to take his property out of his control, and to assign it by judicial proceedings, without his consent, to trustees for distribution among his creditors, such an assignment will not be allowed by courts of another state to prevail against any remedy which the laws of the latter afford to its own citizens against property within its jurisdiction." "It can make no difference whether the persons to whom the involuntary assignment is made, are called assignees, trustees or receivers, or whether the debtor is an individual or corporation, provided either remains in existence and liable to be sued. An assignment under the laws of another state of the Union stands upon the same ground as one made under the laws of a foreign country, for the states are in this respect independent of one another; and subject to no common control, so long as there is no national bankruptcy law. An assignment like that on which these claimants rely, would, if made in another state, be allowed no effect in the courts of New York against proceedings under the laws of that state by its own citizens. The decisions of that state are collected in Willetts v. Waite, 25 N. Y. 577, which cannot be distinguished from this case, and in which an assignment to receivers under the statute of Ohio of all the property of a corporation, established in Ohio, was held to give the receivers no title to funds due to the corporation from a bank in New York as against subsequent attachments in New York by citizens of that state. Trustees must be charged."

In the case of Frank v. Bobbitt, 155 Mass. 112 (29 N. E. Rep. 209) the plaintiff, a citizen of Maryland, brought an action in Massachusetts, and there attached personal property of the debtor, who was a citizen of North Carolina, and who had there made

a voluntary assignment for the benefit of his creditors prior to the commencement of the attachment suit. The court held that the assignment being good at common law, and by the laws of the state of North Carolina, where made, and in no way prejudicial to the interests of the citizens of Massachusetts, no reason was shown why the title of the assignee thereunder should not be recognized in preference to the rights of the attaching creditors citizens of Maryland. The Court said:

"The plaintiff insists that the assignment should be declared void on account of the preference which it creates and because it does not appear to have been assented to by creditors of the assignor, and is without consideration; and they claim the same right to avoid it on these grounds that an attaching creditor, who was a citizen of this state would have. It is to be observed that the assignment is a voluntary one, and not a statutory one, as in Paine v. Lestef, 44 Conn. 196, which was disposed of on the ground that a statutory assignment could have no strictly legal effect outside the state where it arose. As sustaining that proposition, see Blake v. Williams, 6 Pick. 286; May v. Wannamacher, 111 Mass. 202; Willetts v. Waite, 25 N. Y. 587, and cases cited; Kelly v. Crapo, 45 N. Y. 86; Harrison v. Sterry, 5 Cranch 298; Ogden v. Saunders, 12 Wheat. 213; Story Conflict of Laws (7th Ed.) Section 414."

To the same effect is Pierce v. O'Brien, 129 Mass. 314.

In Cunningham v. Butler, 142 Mass. 47, the plaintiffs as assignee in insolvency of one Bird, a citizen of Massachusetts, brought an action in the courts of that state against the defendants Butler and others to restrain them from prosecuting a suit by attach-

ment against the property of the insolvent debtor in the courts of New York. It was practically conceded that within the rule laid down in Dehon v. Foster, 4 Allen 545, the court had jurisdiction in equity upon a proper case made to enjoin the defendants from prosecuting their attachment proceedings in the state of New York. The court said:

"If it had held that the facts in the case at bar are as we apply them to be, the argument of the defendants is principally directed to show that the case of Dehon v. Foster was erroneously decided; and that it should now be reconsidered and overruled. They contend that the provisions of the Constitution of the United States, Art. 4, Sec. 1, which enacts that 'full faith and credit shall be given in each state to the public acts, records, and pudicial proceedings of every other state' was not therein sufficiently considered, and that, as th eattachment proceedings in New York, in the case at bar, are judicial proceedings by a court of competent jurisdiction, the plaintiffs are not entitled to relief, as the courts in that state are entitled to determine to whom the property therein found belongs. They especially rely upon the case of Green v. Van Buskirk, 5 Wallace 307 and 7 Wallace 139; Warner v. Jaffray, 96 N. Y. 248, and Lawrence v. Batcheller, 131 Mass. 504, all of which have been decided since Dehon v. Foster." "But the case of Dehon v. Foster recognizes the law to be as held by the Supreme Court of the United States in Green v. Van Buskirk; 'The case' says Ch. J. Bigelow, 'proceeds on the ground that the defendants, if allowed to proceed with their action, will perfect the lien which is now inchoate under their attachment, and will thereby establish a valid title to the property of the insolvent debtors under the laws of Pennsylvania."

"The case of Lawrence v. Batcheller clearly recognizes the ground above stated as that upon which Dehon v. Foster proceeds, and in no way controverts it. That was a case in which the attaching creditor, who was a resident of this state, had pro-

ceeded to judgment in a foreign state, after proceedings in insolvency here, and had actually collected the amount, by virtue of his attachment, from the funds in the hands of a trustee of the debtor. He was sued in this state for the amount he had thus collected by the assignee in insolvency. It was said, referring to the case of Dehon v. Foster, 'because it was beyond the power of the court to call in question the validity of this lien acquired under the laws of another state, it proceeded to enjoin the defendants over whom the court had jurisdiction, from enforcing in another state their legal rights."

It is clear from what is said in Frank v. Bobbitt, supra, and from an examination of the decisions in the case of Dehon v. Foster, Lawrence v. Batcheller and Cunningham v. Butler, above cited, that the courts of Massachusetts recognize the law to be that an assignment made under the insolvent law of that state, has no effect upon property situate within the limits of another state, and it was for this reason that they proceed to enjoin citizens of that state from proceeding to judgment in an attachment suit brought in a foreign jurisdiction, the effect of which would be to divert property of the debtor which otherwise would come to the possession of the assignee, for the equal benefit of all the creditors of the insolvent, to the payment of debts of the attaching creditors.

The only case cited by counsel for the plaintiff in error which is in point and apparently in conflict with the decisions above cited, is the case of Schuler v. Israel, 27 Fed. Rep. 851, decided by Mr. Justice Brewer in 1886. An inspection of the record in that case shows that the validity of the assignment,

which was made under the Texas statute regulating assignments by insolvent debtors, was drawn in question only in a casual way. The opinion was delivered orally and is merely to the effect that the assignment being "valid in Texas, where it was executed, it must be considered valid here save as it conflicts with the rights of resident creditors."

Citing Burril, Assignm. (3rd Ed.) Sec. 310, and cases cited.

The distinction between a purely statutory assignment depending for its validity upon the statute of a sister state and a general voluntary assignment for the benefit of creditors, good at common law, does not seem to have been called to the attention of the learned judge who decided the case. The assignment was attacked upon the ground that it was not valid under the laws of Texas, and further, that it did not comply with the statute law of Missouri relating to assignments for the benefit of creditors. The point was not made or considered that the assignment was void at common law, and, depending for its validity upon the insolvency statute of the state of Texas ,it had no effect or validity, as against the rights of attaching creditors, upon personal property of the insolvent having its actual situs in another state.

The learned judge cites in support of his conclusion that the assignment was valid, Section 110, Burrill on Assignments. We think it will be found that the cases cited by Burrill under that section do not sustain the proposition that an assignment made in Minnesota under an insolvent act, and

which upon its face is for the benefit only of such of the creditors of the insolvent as shall consent to discharge the debtor from all liability, without full payment of their claims, is valid and effectual as a matter of law, to pass to the assignee the title to personal property of the insolvent, having its actual situs in the state of Massachusetts. The same author (Sec. 303) says:

"In considering the qualifications of and exceptions to this general rule of law, it may be primarily observed that there is a clear and well defined distinction, supported by the weight of American authority, between involuntary transfers of property such as work by operation of law under foreign bankrupt assignments and insolvent laws, and a voluntary conveyance. An assignment by law has no legal operation out of the state in which the act was passed, while a voluntary assignment, it being by the owner, is a personal right of the proprietor to dispose of his effects for honest purposes." Citing Walters v. Whitlock, 9 Fla. 86; Osborne v. Adams, 18 Pick. 247; Kelly v. Crapo, 45 N. Y. 86, and other cases.

The case of Schuler v. Israel, supra, was appealed to this court and was here affirmed on other grounds. 120 U. S. 506. The validity of the assignment was not considered or passed upon.

The case of Barnett v. Kinney, 147 U. S. 480, is not in point. In that case it is distinctly held that the assignment which was made in Utah was valid as a general voluntary assignment, good at common law, and hence effectual to pass to the assignee the title of the assignor to personal property having its situs in the state of Idaho.

We have not thought it necessary to discuss the question of the effect of the notice had by the defendants in error of the assignment in question prior to the attachment proceedings had in the state of

Massachusetts, for we have not found in any of the numerous cases which we have examined, that the question of notice, or want of notice, on the part of the attaching creditor, is a matter of any importance in determining the conflicting rights of an attaching creditor and an assignee in insolvency, although the courts, in sustaining the rights of an attaching creditor as against an assignee, often comment, in passing, upon the fact that the attaching creditor had no notice of the prior assignment.

In the leading case of Paine v. Lester, 44 Conn. 196, it is said:

"It is of no consequence that the attachment was not made until after the assignment in insolvency and after notice of the assignment had been given to Lester, for the right of the plaintiff is not the right of a prior attaching creditor, but the right of a creditor asserting his claim against the opposing claim of the assignee in insolvency, the one resting on legal proceedings authorized by our laws, and the other only on a comity which we can exercise or refuse to exercise at our discretion. Under these circumstances the court owes a legal duty to the plaintiff, which is far more imperative than the demands of mere hospitality to a stranger. In this case the plaintiff is a citizen of Rhode Island, but that fact does not effect the case."

This we think is the settled law upon this subject.

It is respectfully submitted that under the circumstances of this case both of the questions asked by the learned Court of Appeals should be answered in the negative.

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APPENDIX.

Gen. Laws of Minnesota 1881, Chap. 148, as amended by Gen. Laws 1885, Chap. 73 and Gen. Laws 1889, Chap. 30:

Section 1:

"Whenever any debtor shall have become insolvent or garnishment shall have been made against any debtor,or property of any debtor shall have been levied upon by virtue of an attachment, execution or legal process issued against him for collection of money, he may make an assignment of all his unexempt property, for the equal benefit of all his bona fide creditors, who shall file releases of their demands against such debtor, as herein provided; such an assignment shall be made, acknowledged and filed, in accordance with and be governed by the laws of this state relating to assignments by debtors for the benefit of creditors, except as herein otherwise provided; and such assignment, if made within ten days after garnishment shall have been made against the assignor, or within ten days after the property of such assignor shall have been levied upon by virtue of an attachment, execution or other legal process against him for collection of money, as aforesaid, shall operate to vacate every garnishment and levy then pending, and to discharge all property therefrom, upon qualification of the assignee, or his successor, as provided by law, unless he shall, within five days thereafter, file in the office of the clerk of the court, where such assignment was filed, notice of his intention to retain all pending garnishments and levies; in which case the same shall inure to the benefit of the creditors under such assignment, and may be prosecuted by such assignee and his successors; provided, however, that such assignment shall not vacate or effect any levy made by virtue of an execution issued on a money judgment entered against such debtor on a complaint which was on file during at least twenty days next prior to entry of such judgment in the

court in the county where the defendant resided meanwhile."

Section 2:

"Whenever any insolvent debtor shall confess judgment, or do anything whereby any of his creditors shall obtain preference over any other of his creditors or shall omit to do anything which he might lawfully do to prevent any of his creditors from obtaining preference over any other of his creditors, or shall not make an assignment under the first section of this act, within ten days after garnishment made against him or within ten days after levy made on any of his property by virtue of an attachment, execution or other legal process against him for collection of money, or shall conceal, remove, or dispose of any of his unexempt property with intent thereby to delay or defraud his creditors, then, or within sixty days thereafter, any one or more of his creditors having claims against him to the aggregate amount of at least two hundred dollars, may petition the district court, or judge thereof, setting forth facts constituting one or more of said cases,and asking that a receiver be appointed of all the unexempt property of such debtor, and for such other and further relief as may be proper; and said petition may be heard in any county designated by the judge; and upon notice of the time and place of such hearing given as the court or judge shall direct, to the debtor any creditor about to be preferred, the court in term time, or the judge thereof in vacation, shall proceed to hear and determine such petition summarily, and shall receive such evidence as may be pertinent, and if it shall appear to the court, or judge, that such insolvent debtor has confessed judgment, or has done anything whereby any of his creditors have obtained preference over any other of his creditors, or has omitted to do anything which he might have lawfully done to prevent any of his creditors obtaining preference over any other of his creditors, or that he has not made an assignment under the first section of this act, within ten days after garnishment made against him, or within ten days after levy made on any of his prop-

erty by virtue of an attachment, execution or other legal process against him for collection of money, or that he has concealed, removed or disposed of any of his unexempt property with intent thereby to delay or defraud his creditors, then the court or judge shall appoint a receiver, who shall have power and authority to, and who shall take possession of all the property of such debtor, not exempt by law, including all property concealed, removed or otherwise disposed of by such debtor in violation of any provision of this act, and also all property then under garnishment, attachment or levy, except such as was levied upon under an execution issued upon a judgment against such debtor entered on a complaint which was on file in the court in the county where the debtor then resided during the period of at least twenty days next before entry of such judgment; and such receiver shall have power and authority to, and he shall, within four months from his appointment, unless the court or judge shall otherwise direct and shall allow further time, convert said property into money and distribute the net proceeds thereof ratably and in proportion to the amount of their several demands among the creditors of such debtor who shall come in and make due proof of their respective demands within such time and in such manner as the court or judge shall direct, and who shall, in consideration of the benefit of the provisions of this act, execute and file releases of their respective demands against such debtor as herein provided; and the court or judge shall order the debtor to make, verify and file in the court a schedule of all his debts, showing to whom due, when payable, and the consideration of each, and a schedule of all his property. The court in term time, and the judge thereof during vacation, may also make such further and other orders as may be necessary or proper to carry into full effect the provisions of this act, and such orders and applications therefor may be made, served and enforced on Sunday when necessary to protect the rights of creditors or others hereunder."

Section 3:

"No assignment hereafter made for the benefit of such creditors shall give to any one creditor any preference over the claims of another creditor, except in cases expressly provided by law. If any insolvent debtor shall confess or suffer judgment to be procured in any court with intent that any of his creditors shall obtain a preference over any other of his creditors, such insolvent debtor shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding five hundred dollars, and in default of payment shall be imprisoned in the county jail for a period not exceeding six months. The court may at any time, upon the filing of affidavits or other evidence satisfactory to the court, grant an order restraining such debtor from collecting any bills, notes, accounts, or other property, or from disposing of, or in any manner interfering with, the property of said estate, or may, by writ of *ne exeat* or by order, restrain said debtor from leaving the state until the further order of the court, or may require him at any time to appear and make full disclosure as to any disposition of property, or in relation to any other matter pertaining to said estate."

Section 10:

"No creditor of any insolvent debtor shall receive any benefit under the provisions of this act, or any payment of any share of the proceeds of the debtor's estate, unless he shall have first filed with the clerk of the District Court, in consideration of the benefits of the provisions of this act, a release to the debtor of all claims other than such as may be paid under the provisions of this act, for the benefit of such debtor; and thereupon the court or judge may direct that judgment be entered discharging such debtor from all claims or debts held by creditors who shall have filed such releases."

Section 11:

"Such assignee or receiver shall, within ten days after his appointment publish a notice in a daily newspaper published at the capital of this state, and also a daily or weekly newspaper in the county where the debtor, debtors, or any of them, reside, if any is there published, and by sending notices through the mail to such creditors whose residences are known to the assignee or receiver of his appointment, and all creditors claiming to obtain the benefits of this act shall file with such assignee or receiver their claims, within twenty days after such publication."